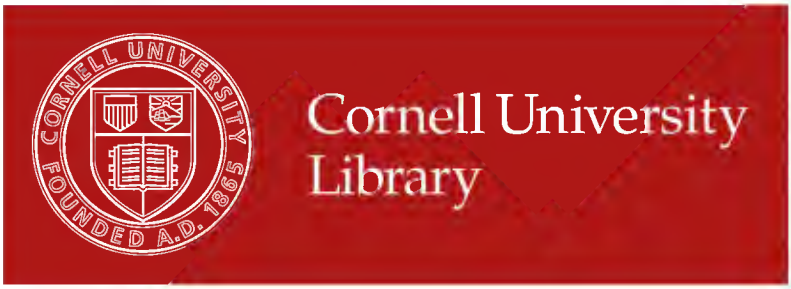

THE

COMMERCIAL POWER

OF

CONGRESS.

BY

PAUL JONES, LL. B.

COUNSELLOR-AT-LAW.

"*The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*"

Constitution of the United States, Article I, Section VIII, Clause 3.

PRIVATELY PRINTED.

NEW YORK, 1904.

My Dear Sir:—

Will you do me the honor to accept this book, in tardy recognition of my indebtedness to you, for your care as a tutor and as a wise counsellor, at the commencement of my professional career.

May I also venture to add, that your own personal and professional connection with the development of the subject considered in its pages, has been such, that I know of no one, who would be more interested in the result, or appreciate more fully the labor it has occasioned me.

No. 54 William Street,
New York, December 1st, 1904.

Yours truly,

Paul Jones.

To:—
Edmund D. Baxter, Esq.,
Nashville, Tennessee.

PRESS OF
CLARENCE S. NATHAN
9 and 11 Franklin St.
New York

PREFACE.

THERE appears to be no subject of more importance, demanding the attention of the American people, at the present time, than a consideration of that clause of the Constitution of the United States, which vests in Congress the power to regulate commerce; and the importance of the subject, arises as much from a steadily increasing demand for a more comprehensive plan for the regulation of trade, by the legislative authority of the federal government, in pursuance of its commercial power, and to what is generally admitted to be the inadequacy of measures hitherto adopted, for the regulation of certain corporations, engaged in the business of transportation, and for the management and control of so-called "Trusts," as it does from that natural tendency to centralization, which is incident to all forms of government.

From the inherent nature of the power itself, its exercise by the federal government, is, of course, primarily a subject for the political consideration and action of Congress; but, since the validity of any action, on its part, is ultimately to be determined by the courts, a correct and intelligent solution of the political question involved in such action, must always depend, upon a proper understanding and appreciation of those general principles of constitutional interpretation, which have been laid down and established, by the Supreme Court of the United States, in determining the subjects, upon which the power

may be exercised, as well as in defining the legitimate scope of its operation.

It is, therefore, only for the purpose of ascertaining these principles, and of tracing the development of the constitutional power of Congress to regulate commerce, in its bearing upon the various subjects to which it has been heretofore applied, that this book has been written, and is now offered to the public.

Being confined to this purpose alone, care has been taken to avoid the expression of any personal views, which the author may entertain, concerning the subjects, considered in its pages, and such expression has been indulged in, only in a few instances, where it was thought to be necessary to a complete elucidation of some doctrine, the authority of which seems to have been brought in question.

But, whatever merit this work may otherwise have, it has been done, in the belief, that, no subject is more worthy of consideration, to the citizen, none calls for a more profound knowledge, on the part of the legislator, or is entitled to a higher respect and reverence, from the jurist, than the principles upon which the Constitution is based; for, under its provisions the personal rights of the people are defined; the limits of legislation is determined, and, in the conscientious enforcement of its principles, by the judiciary, is alone to be found a sufficient guaranty for the contentment and freedom of all.

THE AUTHOR.

THE
COMMERCIAL POWER OF CONGRESS

On account of its inherent nature, as well as the constant enlargement of the scope of its operation, no attempt has been made to define the Commercial Power of Congress, with any degree of accuracy; but, as briefly outlined in the Constitution of the United States, it is that power, in virtue of which the legislative department of the federal government is vested with authority "*to regulate commerce with foreign Nations, and among the several States and with the Indian Tribes.*"*

The delegation of this important and extensive power, to the government of the United States, was the direct result of necessity, growing out of the political and commercial conditions of the several States, when the Constitution was framed and adopted. These conditions had then already become historical, and the causes which lead to their existence are to be traced to a period long prior to the adoption of that instrument, if, indeed, they be not cöeval with the earliest settlement of the Anglo-American colonies in the Western Hemisphere.

The establishment of all the British colonies, in that part of North America, now comprised within the terri-

*Const. U. S., Art. I., Sec. VIII., Cl. 3.

torial limits of the United States, was the direct result of business and commercial enterprise, undertaken by private individuals or mercantile associations, the immediate object of which was personal gain. In their establishment, therefore, the English nation, as a whole, took no substantial part, except, that the Crown, as *parens patriae,* authorized the undertaking and encouraged its success, to the extent of endowing the promoters with proprietary title to vast tracts of unexplored lands, and of erecting them into corporations, by the charters of which, these several landed proprietaries were vested with such ordinary and extraordinary powers, franchises and immunities, of a private and public nature, as were deemed necessary, not only to the proper management of their large estates, but also, to the full and complete political administration of their respective domains, without any restriction or reservation on the part of the grantor, other than the stipulation, that the inhabitants of those lands should bear allegiance to the British Crown, and that they should "have all the privileges of free denizens and persons native of England, ... in such manner and form, as if they were resident within" the realm, "any law, custom or usage to the contrary notwithstanding."*

The several promoters of these colonial settlements having thus been constituted lords-proprietary of the

*See the letters-patent, granted by Queen Elizabeth, to Sir Walter Raleigh, in 1584.—Harper's Encyclopedia of American History, Vol. 7, 371 *et seq;* as to political powers generally, under colonial charters, see also, Martin v. Waddell, 16 Pet., 367; Shively v. Bowlby, 152 U. S., 1; Morris v. United States, 174 U. S., 196.

lands granted to them by the Crown, and having been endowed, by their respective charters, with unlimited powers of government for their management and administration, the several colonies became, at once, separate political communities, wholly independent of each other, and the sole condition upon which these grants were based, having been that of homage and fealty alone, the only political connection between them and the parent-state was that which arose from the application of the principles of the feudal system; from the national origin and character of the corporations, upon whose members these extensive grants were conferred, and from that natural allegiance which the proprietaries and the inhabitants of their respective colonies owed, to the sovereign, as subjects of the British Crown.

Inasmuch, however, as the full exercise of those political powers, franchises and immunities, which were designed for the civil government and administration of the colonies, was vested exclusively in the corporations, to which they were granted, and not to the inhabitants, and, since they were intended to be employed solely for the benefit of their respective corporate members, the colonists, under the earlier charters, at least, were debarred from all participation whatever in the colonial governments, and, at the beginning, they were ruled alone by such laws, statutes and ordinances as the proprietaries, in the exercise of these powers, and in the discretion, conferred upon them by their respective charters, saw fit to enact and adopt for that purpose.* But, these poli-

*If any of the original colonies offered an exception to this

tical conditions did not continue long. Claiming those inherent rights, which had been secured to them by *Magna Carta*, as British subjects, and which had been guaranteed by the several proprietary charters, the inhabitants of colonies were not slow to assert these rights and to demand representation in the governing-councils of the corporations. In addition to this also, the proprietaries soon discovered, that the methods of administration authorized by their several charters, as well as the mode of government adopted by them, were as ill-suited to the political necessities of the colonists, as it was detrimental to their own financial interests. Hence, in order to meet these newly developed conditions, and in recognition of the guaranties contained in their several charters, the proprietaries, either from motives of necessity or expediency, surrendered to the colonists, from time to time, some, if not all, of those political powers, franchises and immunities theretofore exercised by them, as bodies politic and corporate; and thenceforth these powers, franchises and immunities were exercised by the people themselves, until the final abrogation of the original charters, and the conversion of the proprietary colonies into royal provinces.

Although the change thus wrought in the constitutions

general rule, it was because, as in the case of Massachusetts, the inhabitants were joint-members of the corporation, under whose auspices it was planted, and as such members, they were from the beginning entitled to exercise political rights, not accorded to others, or, as in the case of Rhode Island and Connecticut, these rights were originally conferred upon the colonists, by charters granted directly to them by the Crown, and on this account never fell under the proprietary rule.

of the several colonies was intended to bring them and their inhabitants more directly under the control of the Crown, and to subject them to the application of the then steadily growing doctrine of the paramount authority of Parliament, it did not materially effect their substantial political rights. These rights had been accorded to them, not only by the English constitution, as subjects of the British Crown, but they had also been guaranteed by the terms of the several colonial charters, under the proprietary grants, and secured beyond recall, both by direct concessions from the proprietaries and by their long continued and uninterrupted use and enjoyment. Therefore, whenever the Crown or Parliament afterwards undertook to restrict the exercise of any of these rights, on the part of the colonists, the attempt was uniformally resisted by the assertion of their natural rights; by claiming, the royal guaranties contained in the original charters, and by the proprietary concessions made in their behalf.

Likewise, when any of these rights were assailed, or the validity of these concessions were questioned by the Crown or by Parliament, the colonists invoked the doctrine of the inviolable nature of contracts, in its application to the proprietary charters, under which they had been immediately secured; and, while admitting that the abrogation of the original charters might change the authority of the proprietaries, with a thorough knowledge of the law, and of those constitutional principles which afterwards stood them in such practical service, when called upon to establish a government of their own, they always

contended, that this change "could not impair their concessions or political liberties."*

But, whatever may have been the ultimate effect of these contentions upon the actual political condition of the colonists, under the royal régime, it is certain, that the colonies retained much of their former independence; for, while the Crown claimed the right to appoint their executive and other principal officers, retained a limited *veto,* upon their acts of legislation, and asserted the doctrine of colonial government, by royal instruction, all the civil and political rights, theretofore enjoyed by them, were, by new charters, granted directly to the inhabitants of the several colonies, confirmed and ratified, subject only to these reservations, on the part of the Crown, and to the assertion of the paramount authority, claimed for Parliament, over all colonial affairs. So that, even as royal provinces, the colonies were virtually as independent in their political relation to the Crown, and to each other, as they had been, under the proprietary charters.

If, therefore, disputes arose as to the existence of any of these rights, they were always due to the conditions, under which the royal prerogative was claimed, or under which parliamentary authority was asserted; and, whatever may have been the merits of these disputes, they never assumed proportions of any considerable importance, until all the differences, from which they arose, were finally merged into the single constitutional question of the power of Parliament to interfere with the colonial rights

*Bancroft's Hist. U. S. Vol. II., 226.

of legislation, by the imposition of taxes upon their commerce, without the consent of the representative assemblies of the several colonies, for the benefit of the English exchequer. This question arose, however, too long after their establishment to effect the material development of the colonies. They, therefore, continued to increase in population, wealth and political strength, and soon assumed that position of commercial importance which, more than any other cause, secured to England her commanding rank among the maritime nations of Europe.*

*In respect of the extent of the colonial trade, and its commercial importance to Great Britain, it may be interesting to note that as early as 1670 an English author wrote that "Our American plantations employ two-thirds of our English shipping, and thereby give employment to, it may be, 200,000 persons here at home." See Harper's Encyclo. Amer. Hist., Vol. 8, 168. Speaking in the House of Commons, on the repeal of the "Stamp Act," Mr. Pitt estimated the profits of Great Britain, from the trade of the colonies through all its branches, at £2,000,000 a year, and declared that "this fund carried us through the last war;" he also asserted that the direct effect of the colonial trade upon the wealth of England was such that, "estates that were worth two thousand pounds a year three score years ago, are at three thousand pounds at present." See Bancroft's Hist. U. S. Vol. III., 538, 546. And, on a similar occasion, in 1775, Mr. Burke, in the House of Commons, referred to the extent and importance of the colonial trade to the empire in these florid words: "When," says he, "we speak of the commerce of our colonies, fiction lags after truth, invention is untruthful and imagination cold and barren. . . . The commerce of your colonies is out of all proportion to the number of the people. In 1772 the export trade from England to North America, and the West Indies, amounted to £4,791,734, the whole export trade in 1774, £6,509,000, including these and other colonies, which was consequently more than one-third of the whole, £16,000,000, in 1772." See Harper's Encyclo. Amer. Hist., Vol 1, 458. Referring to the same subject the Encyclopedia Britannica says: "Mr. David McPherson, who published his elaborate *Annals of Commerce*, in 1805, states that, in

In passing from the subject of the political conditions under which the several Anglo-American colonies were planted, and under which they were developed and attained their marvelous material growth and prosperity, to that of their commercial conditions, existing at and prior to, the adoption of the Constitution of the United States, it is necessary only to premise, that the two subjects are so intimately connected, that the history of the one is the history of the other, and that, while the three branches of the commercial power of Congress, as outlined in the Constitution, doubtless owe their origin to the same political causes, their development was due to different conditions, arising not only from the relation of the colonies to the Crown, as the sovereign representative of the British nation, under whose authority their existence was derived, but also from their relation among themselves as separate political communities, as well as from the relation of the several colonies with the Indian tribes, with which they came in political and commercial contact.

Originally, the commercial rights of all the colonies, like their political rights, were based upon principles, theoretically, at least, of perfect freedom, in so far as the British government was concerned; since, among the

1764, the total imports of Great Britain amounted in official value to £11,250,660, and the total exports to £17,446,306." See Encyclo. Brit. (9th Am. ed.), Vol. VI., 202. The author of the articles from which this latter statement is taken, says:—"An examination of the foreign trade of Europe two centuries after the opening of the maritime route to India and the discovery of America would probably give more reasons to be surprised at the smallness, than the magnitude, of the use that had been made of these events."

franchises granted to the proprietaries was that of establishing commercial relations and of carrying on trade with the natives, as well as with foreign nations, under such license and regulation only as the several proprietary corporations saw fit to adopt; and, this right having been surrendered to the colonists, with those other political liberties which were conceded to them by the proprietaries, it was, therefore, exercised by them with the same freedom of political action.

And, it is a singular fact, that the British government never undertook to interfere directly with the colonial trade in any of its aspects, except, perhaps, in the matter of the Indian trade of the northern colonies, a few years before the commencement of the Revolutionary War, and in those fruitless attempts which were made by Parliament, after the close of the war with France, in 1763, to levy taxes, in the nature of commercial regulations, the result of which was the Declaration of Independence, the final assertion of colonial freedom, and the establishment of the present Government of the United States.

While, however, no direct attempt was made to restrict that freedom of the commerce of the colonies, which had been accorded to them under the proprietary charters, repeated efforts were made to accomplish this, indirectly, by the application of the several Navigation Acts of Parliament to the colonial trade, the primary object of which was to secure its monopoly to the British metropolis; by the imposition of specific duties upon certain articles imported into the colonies from the West Indies; by the general laws of the kingdom, levying duties upon all

imports and exports to and from the realm, irrespective of the origin of the commodities upon which these duties were levied; by the attempts of Parliament to restrict the inter-colonial trade, in the interest of certain classes of home manufactures, and by the final assumption of all control over the Indian affairs of the northern colonies including trade, in the later years of colonial development.

The first English statutes, in the nature of Navigation Laws, were the laws of *Richard II*,* which provided that no merchandise should be shipped out of the kingdom, except in British ships; but, these laws were enacted by Parliament more than a century before the discovery of America. These Acts, however, were held not to apply to the colonial trade, for the reason that they referred to goods "shipped out of the kingdom;" that the sea-ports of the colonies were not English ports, within the meaning of the statutes, and that the colonies could not be made subject to the provisions of laws in which they were not specifically named.

These harmless Acts were followed by the statute of 1651, enacted by the Long Parliament at the instance of *Cromwell,* as a war measure. It provided that all the commerce of the colonies should be carried in English ships; but, being intended by the Protector, only "to confirm the maritime power of his country" against the Dutch, with whom he was then at war, the occasion for its enforcement ceased with the close of that war, and no attempt was ever made to enforce its provisions against

*Rich. II., stat. 1, chap. 3, and 14 Rich. II., ch. 6. See Encyclo. Britannica, Vol XVII., 277.

the colonial trade.* Indeed, such was the condition of the colonial commerce, even after the enactment of this statute, that, in 1652, when the commercial rights of Virginia were settled, upon the submission of that colony to the authority of the Commonwealth, it was expressly stipulated that the people of Virginia should have "as free trade as the people of England;" and in pursuance of the agreement contained in this stipulation, in 1658, the assembly of that colony "invited the Dutch and all other foreigners to trade with them, on the payment of no higher duty than that which was levied on all English vessels as were bound for a foreign port."†

The next, and by far the most important Navigation Acts, in so far as their detrimental effect on the trade of the colonies was concerned, were those enacted in the reign of *Charles II*, in 1660 and 1663, the object of which was not only to secure to England the exclusive control of the colonial commerce, but also to raise a revenue for the benefit of the royal treasury.

These Acts, among other things, provided that "no merchandise shall be imported into the plantations, except in vessels navigated by Englishmen," prohibited under penalty the importation of any commodity of the growth, production or manufacture of Europe into any

*In the passage of the Act of 1651, the right of the colonies to regulate their commerce was fully recognized, for, says Bancroft, "The Long Parliament was more just" than its successors, "it attempted to secure to English shipping the carrying trade of the colonies, but with the consent of the colonies themselves; offering an equivalent, which the legislatures in America were at liberty to reject." Hist. U. S., Vol. I., 168-9.

†See Bancroft's Hist., U. S. Vol. I., 170, 174.

of the English colonies, unless shipped from the British Isles, in English built vessels, and granted a subsidy to the King, to be collected from all exports and imports, from and into the kingdom, or "any of His Majesty's dominions," thus asserting, in the most unequivocal terms, the commercial supremacy of the enacting power. But, although the existence of these statutes, and the claim of authority upon which they were based, was the cause of grave political and economical apprehensions, and occasioned much strife, on the part of the colonies, their enforcement met with little success; for, it is recorded, that in some of the colonies, the execution of these laws was openly resisted, while in others it was reluctantly submitted to, under a claim of doubtful right, and in those cases where the collection of the royal subsidy was attempted to be made, the proceeds were hardly enough to pay the cost of collection.

The policy of the British Government, in the imposition of specific duties on certain articles, imported into the colonies, from the West Indies, such as sugar, molasses* and rice, was the same as that which inspired the enactment of its general navigation laws, and was directed

*The foreign trade in West Indian molasses was of such considerable importance to the colonies, that Rhode Island alone imported 1,250,000 gallons a year, and in whose behalf, in opposition to the duty imposed by Parliament, it was urged that its effect would put an end to the importation of foreign molasses altogether; that it would destroy the value of costly distilleries of rum in that State, which had been built up and fostered by the free importation of molasses; that it would ruin the rum trade with Spain, and throw the American trade in the hands of the French. See Harper's Encyclo. Amer. Hist., Vol. 4, 419.

principally, if not wholly, against the trade in those articles, which were so largely produced in the Dutch and French West Indian colonies, a ready market for which was always found in the English colonial possessions on the mainland of the continent.

It having already been determined that the provisions of the Shipping Acts of *Richard II,* had no application to the colonies, on the ground that the colonial seaports were not English ports, there is no reason to believe, but that, the products of the colonies were subject to the operation of the general laws imposing duties upon all merchandise imported into the kingdom, and that such merchandise was, therefore, liable to the payment of these duties, to the same extent as like articles imported from foreign countries. It is unnecessary, however, to inquire into the nature and magnitude of these duties, or into the number and extent of the operation of the several statutes under which they were levied, but, as a single instance, may be mentioned the import duty upon tobacco, which was, at first, doubtless due, in a large measure, to the personal hostility of the king to its use, although it was afterwards continued, throughout the colonial existence, as a source of considerable revenue to the Crown,*

*"At an early period in his reign," says Bancroft, "before Virginia had been planted, King James found in his hostility to the use of tobacco a convenient argument for the excessive tax which a royal ordinance imposed upon its consumption. When the weed had become the staple of Virginia, the Stuarts cared nothing for the colony so much as for a revenue to be derived from an import on its product. Whatever display might be made for religion, the conversion of the heathen, the organization of the government, and the establishment of justice,

and, to this extent, imposed conditions upon the colonial trade at variance with the principles of freedom, upon which it had been originally established.

It was evidently to obtain relief from the operations of laws of this nature (for the restrictive system of the Navigation Laws of Spain, Holland and Portugal had not then been adopted by England as a national policy), that the New England colonies, as early as 1643, sent a committee to England to petition a repeal of the laws affect-

the subject of tobacco was never forgotten. The sale of it in England was strictly prohibited, until the heavy import had been paid; a proclamation enforced the royal decree; and, that the tax might be gathered on the entire consumption, by a new proclamation, the culture of tobacco was forbidden in England and Wales, and the plants already growing were ordered to be uprooted. Nor was it long before the importation and sale of tobacco required a special license from the King. In this manner, a compromise was effected between the interests of the colonial planters and the monarch; the former obtained the exclusive supply of the English market, and the latter succeeded in imposing an exorbitant duty." Continuing, the same author also says, "The first colonial measure of King Charles related to tobacco; and the second proclamation, though its object purported to be the settling of the plantation of Virginia, partook largely of the same character. In a series of public acts King Charles attempted during his reign to acquire a revenue from this source. The authority of the Star-Chamber was invoked to assist in filling his exchequer, by new and onerous duties on tobacco; his commissioners were ordered to contract for all the product of the colonies; though the Spanish tobacco was not steadily excluded. All colonial tobacco was soon ordered to be sealed; nor was its importation permitted except with special license; and we have seen that an attempt was made by direct negotiation with the Virginians, to constitute the King the sole factor of this staple. The measure was defeated, and the monarch was left to issue a new series of proclamations, constituting London the sole mart of colonial tobacco; till, vainly attempting to regulate the trade, he declared 'his will and pleasure to have the sole pre-emption of all the tobacco' of the English plantations." Hist. U. S., Vol. I., 166 *et seq.*

ing their trade, and to secure commercial advantages, which resulted in an ordinance of the House of Commons, exempting the commerce of these colonies from the restrictions complained of, and declaring that it should be free; but, it may be noted, that this ordinance was coupled with an express declaration, asserting the commercial supremacy of Parliament.

Whatever, therefore, may have been the effect of the general navigation and revenue laws of England, upon the colonial trade with foreign nations, they were not designed to interfere with the freedom of inter-colonial commerce, and the regulation of this branch of trade was left entirely to the control of the several colonies. Hence, no attempts were made by Parliament to place restrictions upon their inter-colonial trade, until the enactment of the statutes of 1699 and 1732, the purpose of which was not so much to regulate inter-colonial commerce, as it was to benefit English wool-growers, and to protect the manufacturers of certain articles of trade fabricated in the British Isles.

The first of these statutes provided that, "no wool or manufactures, made or intermixed with wool, being the produce or manufacture of any of the English plantations in America, shall be loaden in any ship or vessel, upon any pretext whatever—nor loaden upon any horse, cart or other carriage—to be carried out of the English plantations, to any of said plantations, or to any other place whatsoever;" while the second prohibited the exportation of hats, as well as of their being carried from one colony to another. And, to the same effect, was the bill intro-

duced in the House of Commons, by *Mr. Townsend,* in 1750, which, "forbade the smiths of America to erect any mill for the slitting or rolling of iron, or any plating forge to work with a slit-hammer or any furnace for making steel."*

From all this, it will be readily seen that, in view of the claims made by the inhabitants of the several colonies, and the exercise of authority, inconsistent with these claims, on the part of the Crown and of Parliament, the extent of the political and commercial rights of the colonies as a whole, was never authoritatively defined, from the standpoint of the colonial contention, until the meeting of the first Continental Congress, in 1774.

That body was not revolutionary in its character; nor did it assemble to demand new rights. Its only purpose was to ascertain and define those rights which were already in existence, and to declare them, as the basis of a petition for a redress of grievances, occasioned by their actual or threatened infraction. With this end in view, therefore, this Congress only undertook to define the political and commercial rights of the several colonies, and of the British empire, in respect of their foreign and intercolonial trade at least, by the adoption of a formal "Declaration of Rights," and an "Address to the People of Great Britain," upon which a redress of their grievances was prayed, in order to avoid the waging of civil war.

*Although this clause of the bill was defeated, when it came up for final passage, by a small majority, that portion of it which was passed required an immediate report to be made by every mill then in existence, and it was also provided that the number should never be increased.

The first of these documents declared, in the most sober terms, "That the foundation of English liberty and all free government, is the right of the people to participate in their legislative councils; and as the English colonies are not represented, and from their locality and other circumstances cannot be properly represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their rights of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negation of the sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British Parliament, as are *bona fide* restrained, to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members, excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America, without their consent." And to the same effect was the address to the People of Great Britain, which declared that, "The colonies are entitled to a free and exclusive power of legislation, in their several provincial legislatures, where the right of representation can be alone preserved, in all cases of taxation and internal polity, subject to the negation of the sovereign; but from the necessity of the case, and a regard for the mutual intercourse of both countries, we cheerfully consent to the adoption of such acts of the British

Parliament as are *bona fide* restricted to the regulation of our foreign commerce."*

If no mention of trade with the Indian tribes was made, in either of these memorials, it was probably due to the fact that, being internal in its nature, it never suffered any of the inconveniences which attended the many indirect attempts on the part of Parliament to control the foreign and inter-colonial trade. Hence, from the beginning, this branch of colonial commerce was left to take care of itself, under such regulations as the legislative assemblies of the several colonies deemed proper to prescribe.

However, on account of the war-like nature of these tribes, their relation to the colonies required joint-action upon their part, for mutual protection and defence; and the proximity of some of these tribes to the Canadian border, and their employment by the French, in their several wars against England and her colonies in America, gave the Indian question a weight of considerable colonial and national importance, aside from any consideration of trade.

To these conditions, therefore, was due, not only the formation of the New England Confederation, in 1643, which continued in active existence until the abrogation of the first Massachusetts charter, in 1684, but also, the assembling of those various general Congresses, which were held, from time to time, at Albany and elsewhere, for the purpose of entering into new, and confirming old,

*Journal of Congress, Vol. I., 28, 29; Baldwin's Constitutional View, 69, 181.

treaties with the neighboring Indian tribes; and which finally resulted in the assumption, by the Crown, of all control over the Indian affairs of the northern colonies, in 1756, and their consolidation into one department, under the superintendence of a royal appointee.

This change in the administration of the Indian affairs of the northern colonies, however, having been based primarily upon the necessities of national defence, against the French, and to which the question of trade was of secondary importance, the adoption of the system under which it was effected, was not only approved, but was willingly accepted, by those colonies, which were immediately affected by the system.

From the adoption of the Declaration of Independence, in 1776, until the final ratification of the Articles of Confederation, in 1781, by all the States, the several States were wholly sovereign and independent of each other, in so far as their respective rights and powers, as separate political communities, were concerned.* Hence, during this period, all commercial intercourse with and among them, rested solely on the *jus commune* of nations.

And, this being so, it necessarily follows, that after the adoption of the Declaration of Independence, each of the several States possessed and exercised the power to regulate commerce, in all its branches; and, with the exception of that commerce, which was carried on exclusively within the limits of a single State, all commerce was foreign, whether it partook of the character of inter-state commerce, or was carried on outside the limits of all the

*Hinson v. Lott, 8 Wall., 148.

States, as foreign trade, under the present constitutional acceptation of the meaning of those terms.

During this period, therefore, the power to regulate commerce existed exclusively in the several States,* and each enjoyed the right of intercourse with the others, at the will of those others, both in respect of the transit and residence of their respective citizens, as well as in the introduction and sale of property.

However, the political and commercial effect of this condition was sought to be obviated by the provisions of the Articles of Confederation; for, in reference to foreign commerce, that instrument provided, that, "No State shall lay any imposts or duties, which may interfere with any stipulations or treaties entered into by the United States, in Congress assembled, with any King, Prince, or State, in pursuance of any treaty already proposed by Congress, to the courts of France or Spain," subject to the limitation, that, "no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing imposts and duties on foreigners, as their own people are subject to, or from prohibiting the exportation or importation of any species of goods whatsoever," and that, "no vessels of war shall be kept in time of peace by any State, except such as shall be deemed necessary for the defence of each State, or its trade;" as to inter-state commerce, it provided, that, "the better to secure and perpetuate mutual friendship and intercourse, among the people of the different States, . . . the people of each State shall have free ingress and re-

*Baldwin's Constitutional View, 181.

gress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively; *provided,* that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant," and, in respect to the Indian trade, it was provided, that, "the United States . . . shall have the sole and exclusive right and power of regulating . . . the trade and managing all affairs with the Indians, not members of any State."*

Whatever may have been the design and effect of these provisions of the Articles of Confederation upon the commercial power of the several States, or, for that matter, upon any of their sovereign powers, it was early demonstrated, that that instrument was but a "feeble league of friendship,"† and, as a scheme of government, the Confederation was acknowledged, on all hands, to be bad from beginning to end. This arose from the fact that there was no executive, no judiciary, and only the semblance of a legislature; acting on States and not on individuals, Congress never secured a hold on the people; it was looked upon as a revolutionary body and was treated first with indifference and then with contempt.‡ The Articles of Confederation, therefore, was not the strong tie which bound the colonies together during the severe trials of the revolutionary struggle; but it was rather the

*See Articles of Confederation, Arts. IV., VI., IX.
†Hinson v. Lott, 8 Wall., 148.
‡Framers and Framing of the Constitution, (McMaster), Century Magazine, September. 1887.

mutual sympathies aroused by a common cause. These dissolved, on the return of peace, and the very principles which gave rise to the war of independence, it has been said, "soon began to threaten the Confederacy with anarchy and ruin,"* thus fulfilling the saying of *Lord North,* at the beginning of the struggle, when he described the American Union as "a rope of sand."

It will, therefore, be seen that during the existence of the Confederation, the commercial power remained practically in the same condition as it was, when the Declaration of Independence was adopted, subject to all the municipal laws and regulations of the several States.

This was so, not so much because the Articles of Confederation did not undertake to vest the power to regulate commerce, in the Congress of the United States, as then constituted, as it was because, notwithstanding the delegation of an undoubted authority over the subjects to the general government, that government had neither the necessary machinery to establish effective regulations, nor sufficient power, as a governing body, to carry its legislation into effect.

As to the condition of the foreign commerce of the country, prior to the adoption of the present Constitution, *Mr. Chief Justice Marshall* says:—"It was regulated by foreign nations, with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent, by the want of combination. Congress indeed possessed the power of making treaties, but the inability of the federal government to enforce

*Gibbons v. Ogden, 9 Wheat, 1.

them became so apparent as to render that power in a great measure useless," and, in the exercise of their independent commercial power, by the several States, a spirit of selfishness, in legislation, was soon developed, which "began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulation, destructive of the harmony of the States, and fatal to the commercial interests abroad."*

So, the conditions of their commerce, among themselves, was not unlike that which affected their foreign commerce; for, it was found, that, rivers and bays, in many cases, formed dividing lines between the States, upon which they, severally, claimed and exercised all the rights and powers of sovereign nations, and in enacting laws for the regulation of the navigation of these waters, many repugnances were found to exist, arising either out of a misconception of powers, or enacted in a spirit of retaliation, pure and simple.†

*Brown v. Maryland, 12 Wheat., 419.

†This condition was not confined to early State legislation, under the Articles of Confederation, but was continued even after the adoption of the present Constitution. Thus, a law of New York provided that no one should navigate the bay of New York, the North River, the Sound, the Lakes or any of the waters of the State, by steam vessels, without a license of the State of New York or of its grantees. So, a law of Connecticut prohibited any one to enter her waters, with a steam vessel having such a license from the State of New York; while the New Jersey Legislature declared that, if any citizen of that State should be restrained under the statute of New York from using steamboats between the ancient shores of New Jersey and New York, he should be entitled to an action for damages, in New Jersey, with treble costs, against the party who thus restrains or impedes him, under the laws of New York; and this act of New Jersey was entitled, "An Act of retortion against

The general embarrassments under which this condition of affairs placed the commerce of the country, were not long in being felt and in impressing their weight upon the attention of the statesmen and patriots of that day; and true to the dictates of the highest wisdom and soundest policy, they set about to remedy the evils with which they found themselves confronted.

Therefore, as early as 1778, hardly before the Articles of Confederation had been proposed to the several States for approval and ratification, the subject of a uniform regulation of commerce was pressed upon the attention of Congress, by a memorial from the State of New Jersey,* the authors of which complained that the regulation of trade was in the power of the several States, and within their several respective jurisdictions, to such a degree as to involve many difficulties and embarrassments; and, its framers expressed the earnest opinion, that the sole and exclusive power to regulate commerce with foreign nations ought to be vested in Congress.†

So, in 1780, two conventions were held in New England, to consider the condition of the country and to devise means to establish a more effective federal government. The convention held in that year, at Hartford, took into consideration, specially, the financial situation of the country at the time, and recommended a plan, urging the several States to suffer Congress to tax them,

the illegal and repressive legislation of New York," and was defended, by its authors, on the principles of public law, which justify reprisals between independent States.

*Brown v. Maryland, 12 Wheat., 419.

†Laws U. S., Vol. I., 28.

according to population, and authorizing that body to expend the revenue, so raised, in payment of the interest on the public debt, while the Boston convention declared in favor of a more solid and permanent union, under one supreme head, and "a Congress competent for the government of all those common and national affairs, which do not and cannot come within the jurisdiction of the several States."

Although the action of neither of these conventions seems to have referred directly to the subject of commerce, and the necessity of its regulation by the general government, it shows, at least, a growing conviction on the part of the Eastern States, that there was an imperative necessity for the establishment of a stronger and more effectual union between the States, since there were subjects of a recognized general nature, which could not be exercised advantageously by the States separately, and ought to be vested in the government of such a union.

Following the memorial of the Legislature of New Jersey, of 1778, *Mr. Witherspoon,* a delegate in Congress from that State, presented to that body, in 1781, a resolution in the same spirit, but carrying the principle, upon which it was based, still further, in its application to commerce, by affirming, that it was indispensably necessary that the United States, in Congress assembled, should be vested with the right of superintending the commercial regulations of every State, in order that none shall take place, which shall be partial or contrary to the common interest.*

*Gibbons v. Ogden, 9 Wheat., 1.

So, in 1784, finding itself confronted by the interminable difficulties and embarrassments which had then arisen in respect of the commercial relations with foreign nations, Congress adopted a resolution addressed to all the States, recommending and urging, that they should authorize the general government, for a limited time, to regulate the foreign commerce of the country. But, the States having declined to grant the requisite authority, under this resolution, the measure failed. As a result of this failure, however, Congress appointed a committee to take the matter into consideration. The report of this committee, which was submitted, at the next session of Congress, in 1785, declared, in the strongest terms, that Congress ought to have the sole and exclusive power to regulate trade, as well with foreign nations as among the States.*

So, that, during all these years, it will be seen, that there was no lack of practical proof of the necessity of some uniform system of commercial regulation in the general government; and, with what might seem to have been an ample power, vested in Congress, by the Articles of Confederation, that body found itself impotent to deal even with the subject of foreign commerce under treaties already made by it, and the local jealousies of the several States rendered it impossible to gain their consent to the exercise of such powers, as it nominally had, even for a limited period.

Difficulties had likewise arisen between the States, as to the regulation of commerce among themselves. Thus, in consequence of a lack of concerted action between the

*Laws U. S., Vol. I., 50.

States of Maryland and Virginia, concerning the navigation of the Potomac and Roanoke Rivers and the Chesapeake Bay, a joint-commission was called to meet, at Mt. Vernon, in 1785, to devise means for the adjustment of all differences between them, and to define their respective jurisdiction over these waters.

The proceedings of this commission show, that its members "had not been very long at work, when they saw that common duties and common principles for explaining the meaning of commercial laws and settling disputes about the currency were just as necessary as well defined rights on river and bay;" but with these things, the commission had nothing to do. Yet, such appeared to have been the importance of the subject, that its members ventured to draft a supplemental report to the Legislatures of their respective States, in which was set forth the needs of legislation on the subject of the currency, duties, and commerce in general, and urging the appointment of two commissioners, each year, by either State, for the purpose of arranging such matters, for the ensuing year. The Legislature of Maryland readily accepted the report, and requested Delaware and Pennsylvania to join in the scheme; but, Virginia went further, and proposed to all the States, to call a trade convention, to be held at Annapolis, in the following year.

The preamble to *Mr. Madison's* resolution, in the Virginia Assembly, authorizing the appointment of delegates from that State to the proposed convention, recited that, "Whereas, the relative situation of the United

States have been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy of obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations, in the ports of the United States; for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate legislation," therefore, the resolution declared, that the purpose of the proposed general convention be, "to take into consideration the trade of the United States, to consider how far an uniform system, in their commercial regulations may be necessary to their common interest and their permanent harmony."*

While other causes may have conduced to the calling and assembling of the Annapolis convention of 1786, this preamble and resolution shows, that the primary cause of the recommendation of the Legislature of Virginia was the commercial necessities of the States, and a purpose on the part of its framers, that that convention should consider and devise some practical means for an effectual and harmonious regulation of trade.

This convention was attended by delegates from Virginia, Pennsylvania, New York, New Jersey and Delaware only. Therefore, with representatives from less than half the States present, the convention found itself powerless to accomplish the purposes for which it had been called. Nevertheless, it remained in session for two days, and its proceedings were directed to a discussion of the low state of trade and commerce, and in

*Gibbons v. Ogden, 9 Wheat., 1.

lamenting the want of power in the general government to afford proper relief. And, before adjournment, the delegates proposed and adopted a report to be presented to their respective States and to Congress, urging the call of a convention to meet, at Philadelphia, in the following May, not only for the purpose of considering the condition of trade, but also for a more extensive revision of the Articles of Confederation, as the embodiment of a more complete and perfect system of federal government.

In pursuance of the recommendations contained in this report, Congress immediately adopted a resolution declaring the expediency of holding a convention for the sole and express purpose of revising the Articles of Confederation, and this resolution was submitted to the Legislatures of all the States for their approval and action; and their approval having been obtained, the Constitutional Convention met at Philadelphia at the time appointed.

The result of its deliberations, as is well known, was the establishment of the present government of the United States, under the Constitution as it now exists, with the exception of such amendments only as have, since, from time to time, been adopted, adding to, taking from or modifying the powers of the general government, as defined in that instrument.

Considering, therefore, the direct and immediate causes which led to the assembling of that convention, and the results accomplished by its labors, it is a well settled fact that the want of power, in the general gov-

ernment, to regulate commerce with foreign nations and among the several States, was one of the leading defects of the Confederation, and, certainly, as much as any other cause, led to the establishment of the present Constitution*, and that the many difficulties and embarrassments attending the regulation of commerce, under the old system, were among the great and leading inducements to its adoption, all of which justify the conclusion of *Mr. Webster* that, "Over whatever other interests of the country this government may diffuse its blessings, it will always be true, as an historical fact, that it had its origin in the necessities of commerce, and for its immediate object the relief of those necessities by removing their cause and by establishing a uniform and steady system."†

It is thus apparent, that the main object and chief design of the framers of the Constitution, in vesting in Congress the power to regulate commerce, was to insure uniformity and consistency on all matters of a commercial character affecting the intercourse of the States with each other and with foreign nations;‡ to secure uniformity of regulation against conflicting and discriminating state legislation, in so far as that legislation may affect the operations of the commerce of the United States;§

*See Cook v. Pennsylvania, 97 U. S., 566; Brown v. Maryland, 12 Wheat., 419 (446); Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 U. S., 557; State Tax Tonage Cases, 12 Wall., 204.

†Gibbons v. Ogden, 9 Wheat., 1.

‡The Lattawanna, 21 Wall., 558.

§Welton v. Missouri, 91 U. S., 275; County of Mobile v. Kimball, 102 id., 691; Walling v. Michigan, 116 id., 446.

to establish a perfect equality among the several States as to commercial rights, in order to prevent unjust and invidious distinctions, which local jealousies and partial interests might be disposed to introduce;* to insure equality of commercial facilities, by preventing one State from building up her own trade at the expense of other States;† to guard against the possibility of commercial embarrassments which would result if one State could directly, or indirectly, prohibit particular property from entrance into its territory, from another;‡ and thereby to prevent commercial conflict among them,§ and, for the protection of the general interests, as involved in inter-state and foreign commerce.¶

Owing to the general terms in which the commercial power of the federal government is vested in Congress by the Constitution, there has been much conflict of opinion as to the nature of this power, from which many difficulties have arisen in the various attempts made by the courts to determine the meaning of the word commerce, as well as to ascertain the full extent of the operation of the power itself.

For this reason, it was always customary, with the earlier jurists, to consider the purposes of the framers of the Constitution, in vesting the commercial power in Con-

*Veazie v. Moor, 14 How., 567; Gibbons v. Ogden, 9 Wheat., 1; Mayor, *etc.*, of New York v. Miln, 11 Pet. 102; Brown v. Maryland, 12 Wheat., 419; License Cases, 5 How., 504.

†Bowman v. Chicago & Northwestern Railroad Co., 125 U S., 465 (514).

‡Leisy v. Hardin, 135 U. S., 100 (112).

§Graves, *et al.* v. Slaughter, *et al.*, 15 Pet. 449.

¶Northern Securities Co. v. United States, 193 U. S., 197 (352).

gress, in order to determine its nature and the extent of its operation; but, of late, there has been shown a disposition to disregard this method of inquiry, and, it has been recently declared, that the reasons which may have caused the framers of the Constitution to repose the commercial power in Congress, do not affect the limit or the extent of the power itself.*

Etymologically the term commerce is derived from the Latin words, *con* and *mercis,* and, in its simplest form, denotes a mutual selling or traffic, which necessarily consists in the purchase, sale and exchange of commodities;† and commerce, in its ordinary and practical acception, is said to be trade, bargain, sale, exchange, barter, embracing all these terms, both as its means and object.‡

However, on account of the general purposes for which the federal government was established, as well as the very nature of the commercial power of Congress itself, the meaning of the term commerce has been constantly enlarged in order to meet the continued and ever recurring changes in the conditions and requirements of modern trade. So that, the term commerce is now held to consist not only in the purchase and sale of commodities, but in its broadest signification it has also been said to mean the purchasing and selling of articles of

*Addyston Pipe & Steel Co. v. United States, 175 U. S., 211.

†County of Mobile v. Kimball, 102 U. S., 691; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196; Kidd v. Peason, 128 U. S., 1 (20); Northern Securities Co. v. United States, 193 U. S., 197 (379).

‡Passenger Cases, 7 How., 283 (500), *per* Daniel, J.

necessity,* as well as their production and manufacture; in buying from one nation and selling to another, and in transporting the merchandise so purchased and sold, from the seller to the buyer, to gain the freight.† It likewise embraces every act of sale, whether by word of mouth only or by the exhibition of samples, and consequently covers the negotiation for the purchase, sale and exchange of goods.‡ Commerce has, therefore, been held to consist in commercial intercourse between nations and parts of nations,§ including navigation and intercourse,¶ and extends to the transportation of persons and property for hire;|| and transportation includes all the instruments of shipment or carriage.**

So, transportation implies the taking up of persons and property at some point, and putting them down at another, and the receiving and landing of passengers and freight are incident to transportation. Commerce also includes the means of transportation and intercourse between nations and parts of nations, whether by naviga-

*Gibbons v. Ogden, 9 Wheat., 1 (191 *et seq.*); Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196 (203); Kidd v. Pearson, 128 U. S., 1 (20); United States v. E. C. Knight Co., 156 U. S., 1 (22).

†Passenger Cases, 7 How., 283 (416).

‡Robbins v. Shelby County Taxing District, 120 U. S., 489; Leloup v. Port of Mobile, 127 U. S., 640; Caldwell v. North Carolina, 187 U. S., 622.

§Passenger Cases, 7 How., 283.

¶Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How., 421.

||Passenger Cases, 7 How., 283; Crandall v. Nevada, 6 Wall., 35; Chicago & Northwestern Railroad Co. v. Fuller, 17 id., 560.

**Interstate Commerce Commission v. Brimson, 154 U. S., 447 (457).

tion or passage over land, and the means of transportation of persons and freight do not change the character of the business as one of commerce; neither does the time within which the distance may be traversed,* nor the magnitude of the traffic, nor the extent of the intercourse.† And the means of transportation and intercourse embraces ships and vessels as instruments of intercourse and trade, as well as the officers and seamen employed in their navigation.‡ So, the telegraph is held to be an instrument of commerce, and as such falls within the regulating power of Congress under the commercial clause of the Constitution;§ and the term vessel embraces not only ships, but also all commercial vehicles which have been brought into existence since the adoption of that instrument.

Hence, commerce with foreign nations and among the States of the American Union means nothing less than intercourse with those nations and among those States for the purposes of trade, be the object and extent of that trade what it may; and thus, in its broadest signification, intercourse must include all the means by which commerce may be carried on, whether by the free naviga-

*Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.

†United States v. 43 Gallons of Whiskey, 93 U. S., 188.

‡Hall v. De Cuir, 95 U. S., 485. As to seamen, it is held that contracts for their wages are exceptional in character, and may be subject to special restrictions, and, whenever they relate to commerce, not wholly within a State, legislation enforcing such restrictions comes within the domain of Congress, under the commercial clause of the Constitution. Patterson v. Bark Eudora, 190 U. S., 169.

§Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 id., 1; Western Union Telegraph Co. v. Texas, 105 id., 460.

tion of the waters of the several States, or by a passage, over land or through the States, when such passage becomes necessary to commercial intercourse.* And, as was aptly said, by *Mr. Webster,* in the case of *Gibbons* against *Ogden,*† "nothing is more complex than commerce, and in an age like this, no words embrace a wider field than commercial regulation," to which *Mr. Justice Johnson,* who delivered a separate opinion in that case, has added that, "The subject, the vehicle, the agent and the various operations of commerce thus become the objects of commercial regulation; and these various objects are so vital to the commercial prosperity of a people, that the nation which cannot legislate concerning them would not possess the power to regulate commerce."

Independent of all constitutional considerations, however, the power to regulate commerce is the power to prescribe rules and to impose conditions by and under which it is to be governed.‡ Thus, the enactment of a law, by any government, which prescribes conditions upon which vessels shall engage in commerce is a regulation of commerce;§ and any law is a regulation of commerce which imposes new conditions and terms on the coasting trade, or on foreign trade generally, or on foreign trade as regulated by treaties, or which, in anywise, interferes with the free use of navigable streams.¶

*Philadelphia & Reading Railroad Co. v. Pennsylvania, 15 Wall., 232.

†9 Wheat., 1 (9).

‡Addyston Pipe & Steel Co. v. United States, 175 U. S., 211 (242).

§Henderson v. Wickham, 92 U. S., 259.

¶Gibbons v. Ogden, 9 Wheat., 1 (26), *per* Mr. Webster.

And so, a quarantine law, which arrests a vessel on its voyage, affects commerce, and since it interrupts the voyage, extends to the vessel, officers, seamen and passengers, it is a regulation of commerce;* the same result may be attained by duties imposed upon the subjects of commerce, or on the receipts therefrom, or on the occupation or business of carrying it on,† and under certain circumstances the regulation of commerce may take the form of and have the effect of prohibition.‡

Rules for the regulation of commerce may, therefore, be established in various ways, such as the imposition of a tax in the nature of discriminating, protective or prohibitory duties,§ and the levying of a tax upon freight or passengers, passing through a State, is likewise a regulation of commerce within the meaning of the Constitution;¶ and commerce may also be regulated by the exercise of the police power of the States.**

Since commerce is declared to include navigation and the transportation of persons and property, as well as the means and instruments employed in such transportation, the regulating power of Congress extends to transportation in all its branches, and to all the means of

*Compagnie Francaise de Navigation â Vapeur v. Board of Health, 186 U. S., 380 (388).

†Postal Telegraph Co. v. Adams, 155 U. S., 688 (695, 6).

‡Northern Securities Co. v. United States, 193 U. S., 197, citing *In re* Rahrer, 140 U. S., 545; Lottery Case, 188 U. S., 321 (355).

§Brown v. Maryland, 12 Wheat., 419; see also New York, Lake Erie & Western Railroad Co. v. Pennsylvania, 158 U. S., 431.

¶Pickard v. Pullman Southern Car Co., 117 U. S., 34.

**Illinois Central Railroad Co., v. Illinois, 163 U. S., 142.

transportation within the limits of every State in the Union;* and also, since the term includes the agencies of commerce, it embraces all such agencies whether they be individual or corporate in their character.† It, therefore, matters not that, in the course of a commercial transaction properly falling within the purview of the Constitution, several different and independent agencies are employed, or that such agencies act within the limits of a single State or within two or more States; if the subject of the transaction be within the constitutional power of Congress, these facts do not affect the exercise of the power, and to the extent to which each agency acts, in that transaction, it is unquestionably the subject of federal regulation.‡

But, in arriving at these conclusions as to the meaning of the term commerce, and as to the extent of the power of Congress to regulate the trade of the United States under the Constitution, the subject has not been wholly free from contention, either on the part of counsel or of the courts, whose duty it has been to construe and apply the principles upon which they are based.

Thus, it was early contended, that the power of Congress to regulate trade, carried on over the navigable streams of the United States, is more extensive than that commerce which is confined to the land within its territorial limits, because, as was argued, navigation is not

*Gibbons v. Ogden, 9 Wheat., 1 (197); Passenger Cases, 7 How., 283 (351); Brown v. Maryland, 12 Wheat., 419.

†Paul v. Virginia, 8 Wall., 168; Gloucester Ferry Co., v. Pennsylvania, 114 U. S., 196.

‡The Daniel Ball v. United States, 10 Wall., 557.

merely incidental to the power of regulating commerce, but it is commerce itself, as inseparably connected with it, as vital motion is to vital existence.* This distinction, however, was held to have no reason for its support, since in the very statement, navigation is defined to be commerce, from which necessarily arises a confusion of the terms upon which the argument is based. Besides, the fact remains, that neither the land nor the water embraced within the limits of the United States, as land and water, is a part of commerce or navigation, but only subject to be adapted, as ways or thoroughfares of commerce, only when they are required by either.† Hence it has been determined that, when so adapted, both land and water are within the regulating power of Congress to the utmost extent of the delegation of that power to the federal government.

And, so of the application of the power to persons, and vessels employed in the carriage of passengers as subjects of the commercial regulation of Congress.

This question was first raised, before the Supreme Court of the United States, in the case of *Gibbons* against *Ogden*,‡ where *Mr. Wirt*, as Attorney General, took the position that, since commerce always implies inter-communication and intercourse, and inasmuch as the great national object, in vesting the commercial power in Congress, was to enable the legislative department of the federal government to regulate the terms on which all

*Gibbons v. Ogden, 9 Wheat., 1 (229), *per* Johnson, J.
†Holmes v. Jennison, *et al.*, 14 Pet., 540.
‡9 Wheat., 1; see also, Passenger Cases, 7 How., 283 (557), *per* Woodbury, J.

commercial intercourse, between foreigners and this country, and between the different States of the Union, should be conducted, and upon this, assuming that the compensation paid for transportation, is the true test of the commercial character of such transactions, he argued that, if the freight be the test of commerce, then the regulation of passengers is included in the commercial power of Congress, because, as he maintained, freight is the compensation for the hire of the ship, and such hire, whether received from the carriage of passengers or goods, was nothing less than freight. These views of counsel were adopted, by the Chief Justice, *Mr. Marshall,* in delivering his opinion, in that case, when he says:—"No distinction is perceived between the power to regulate vessels in transporting men for hire and property for hire," a conclusion which he deduced not from the commercial power of Congress alone, but also, from that clause of the Constitution which provides, that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress," prior to the year 1808,* by saying that "this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and those who pass involuntarily." The analogy here sought to be drawn by the learned Chief Justice, however, between the two classes of cases does not appear to strengthen the argument, for the reason, that the persons referred to in this clause of the Constitution were

*Const. U. S., Art. I., Sec. IX., cl. 1.

slaves, and, therefore, the means used in their transportation was subject to the same rules as those which were applied to ships employed in the carriage of ordinary freight.

Nevertheless, the question was not directly in issue in that case, and the expressions of the learned Chief Justice being *obiter dicta,* no rule was established, and the question continued an open one, until the decision in the case of *The Mayor, Aldermen and Commonalty of the City of New York* against *Miln,** in which the court upon a division of opinion, took an entirely different view of the matter, and laid down the rule, that the commercial power of Congress did not apply to the regulation of passenger vessels. The appeal in that case was based upon a statute of the State of New York, which required the master of every vessel, arriving in the port of New York from any foreign port or from a port of any of the United States, other than the State of New York, under certain penalties named in the statute, to make a report, in writing, containing the names, ages, and last place of residence of every person on board the vessels commanded by him during the voyage. And, in considering the constitutionality of this statute, *Mr. Chief Justice Taney,* drew a distinction between the case at bar, and the case of *Brown* against *Maryland,*† in which it had already been determined that a statute of the State of Maryland, imposing a license fee upon importers and sellers of imported goods by wholesale, bale or package, was void

*11 Pet., 102 (136).
†12 Wheat., 419.

as being in contravention of the commercial power of Congress. "It is difficult," he contended, "to perceive what analogy there can be between a case where the right of a State was inquired into in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to the right over persons within its acknowledged jurisdiction; the goods are the subjects of commerce, the persons are not. The court did extend the power to regulate commerce so as to protect the goods imported from a state tax after they were landed and were yet in bulk. But why? Because they were the subject of commerce, and because the power to regulate commerce, under which the imposition was made, implied a right to sell; that right was complete without paying the State for a second right to sell whilst the bales or packages were in their original form. But how can this apply to persons? they are not the subjects of commerce, and not being imported goods cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce and the prohibition to the States from imposing a duty on imported goods." The decision of the court in this case, though not without a serious division of opinion,*

*In delivering a dissenting opinion, in the Miln case, Mr. Justice Story contended that, if the powers to regulate commerce be exclusive in Congress, there is no difference between an express or implied prohibition upon the States; and that, generally if an act of a State be a regulation of commerce, and the subject upon which it operates belongs exclusively to Congress, it was a means cut off from the range of State sovereignty and State legislation, and was void. So, the learned justice continued, "The power given to Congress to regulate commerce, with foreign nations and among the

was, therefore, that the statute of the State of New York, in question, was not a regulation of commerce within the meaning of the Constitution of the United States, and it established the doctrine, that persons were not the subjects of commerce, and do not fall within the principles enunciated in the case of *Brown* against *Maryland.**

The opinion of a majority of the court upon which this decision was based, however, rested, not so much upon the character of the vessels employed in the transportation of passengers, as upon the character of the passengers themselves.

This decision was rendered in 1838, and there the matter stood until the *Passenger Cases*† came up for determination in 1849. These cases were two in number, and involved the constitutionality of a statute of the State of New York, which imposed certain fees upon the master of every vessel entering the port of New York, from foreign ports, for himself, each cabin and steerage passenger, mate, sailor and mariner, for the use of the Marine Hospital, and a statute of the Commonwealth of Massachusetts relating to alien passengers, which required an examination of such passengers arriving at the port of Boston, and provided that, upon such exam-

States, has been deemed exclusive, from the nature and objects of the power and the necessary implication growing out of its exercise. Full power to regulate a particular subject implies the whole power, and leaves no residuum, and the grant of the whole to one is incompatible with a grant to another of a part. When a State proceeds to regulate commerce with foreign nations and among the States, it is doing the very thing which Congress is authorized to do." 11 Pet., 102 (157-8).

*See Passenger Cases, 7 How., 283 (494).

†7 How., 283.

ination, the master, consignee or agent of vessels transporting them, should pay for the support of foreign paupers, a certain fee for every such passenger as might be found incompetent to maintain himself.

Following the rule laid down in the case of *The Mayor, Aldermen and Commonwealth of the City of New York* against *Miln,* these statutes were held to be constitutional by the highest courts of the States of New York and Massachusetts, respectively, and from their decisions, appeals were taken to the Supreme Court of the United States for final review. In the decision of these cases by that court, however, there developed an irreconcilable difference of opinion among its members, not only as to the constitutionality of the acts upon which the appeals were based, but also as to the actual conditions under which the *Miln* case had been determined;* for all the

*In delivering their separate opinions in the Passenger Cases, a verbal altercation, in which no little feeling was displayed on either side, took place between Mr. Taney, the Chief Justice, and Mr. Justice Wayne, as to what were the views of the majority of the court in the case of Mayor, *etc.,* of New York *vs.* Miln, in which the latter took occasion to make a statement of the circumstances under which that case was decided, in order, as he said, "that hereafter the profession may know definitely what was and what was not decided in that case by the court." The effect of this statement was that, when that decision was rendered, a majority of the court—four out of seven—were of the opinion that the power of Congress to regulate commerce was exclusive; that the opinion of Mr. Justice Thompson, who had been appointed to deliver the opinion of the Court, was objected to, on consultation, as containing expressions inconsistent with that view, and that the opinion of Mr. Justice Barbour, which was delivered, as that of the court, did not, so far as anything contained in it was liable to the same objection, command the assent of a majority of the Judges. To which the Chief Justice replied that, of the seven Judges who then com-

judges read separate opinions, giving their individual views upon the subject involved, with the exception of *Mr. Justice Nelson,* who concurred in the opinion handed down by *Mr. Taney,* the Chief Justice,* and the decision of the court was embodied in an order to the effect that the statutes of the States of New York and Massachusetts, imposing taxes upon passengers arriving at the ports of these States, were contrary to the Constitution of the United States, and, therefore, void, and its result

posed the court, four had already died, and, he protested, against a statement of circumstances, which rested only in memory, to impair the authority of a settled rule, fearing lest it might tend to shake the public confidence in the weight of the court's decision. Passenger Cases, 7 How., 283 (429, 487).

*The learned Chief Justice, in his opinion in these cases, argued that the power contended for, by the majority of the court, could not be maintained, except by the introduction of the word "intercourse" into the Constitution, and that, if such be the case, then it comes to this, that intercourse means nothing more than "commerce," being merely the addition of a word without changing the argument. "If," says he, "commerce with foreign nations could be construed to include persons, and to embrace travellers and passengers, as well as merchandise and trade, Congress would also have the power to regulate this intercourse between the several States, and to exercise this power of regulation over citizens passing from one State to another. It, of course, needs no argument to prove that such a power over the intercourse of persons passing from one State to another is not granted to the Federal government by the power to regulate commerce among the several States. Yet, if commerce does mean the intercourse of persons between the several States, and does not embrace passengers or travellers from one State to another, it necessarily follows that the same word does not include pasengers or travellers from foreign countries. And, if Congress, under its power to regulate commerce with foreign nations, possesses the power claimed for it, in the decision in this case, the same course of reasoning and the same rules of construction (substituting 'intercourse' for 'commerce') would give the general government the same power over the intercourse of persons between the different States." 7 How., 283 (493).

was the abrogation of the doctrine laid down in the *Miln* case, and the extension of the commercial power of Congress to vessels carrying passengers, as well as to the passengers themselves.

It is a self-evident proposition, that the subject upon which any power is intended to operate is not the power itself, and for this reason, while the term commerce, as thus enlarged and defined by the Supreme Court of the United States, may, to some extent, indicate the various subjects upon which the commercial power of Congress may operate, it by no means determines the full scope of its operation. Hence, in order properly to ascertain the scope of the operation of the commercial power of Congress, it has been found necessary to resort to a consideration of the cardinal principles underlying the general powers of the federal government, as well as to the nature of that government, in respect of the several purposes, for which it was instituted and established, the necessity recommending this mode of construction, arising from the fact that, under the federal system, the powers of government are possessed and exercised by two separate and distinct sovereignties operating, at the same time, upon the same people, within the same territory, and often upon the same subject.

Among the fundamental doctrines of American constitutional law, based upon the historical development of the Union, are that, prior to the establishment of the federal government, all political power resided in the people of the several States; that this condition arose from their colonial history and development, and from

the situation of the States as separate and independent political communities when they declared themselves free from all allegiance and connection with Great Britain; that those powers, which were not delegated to the general government, by the Constitution, were, and still are inherent in the several States, or in the people thereof, and that these powers may be exercised by the States without restraint and independently of the federal relation, established by that instrument, between the States and the United States; that the federal government is the creature of the Constitution, and as such, exercises its functions only under delegated authority, and that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."* Therefore, notwithstanding the adoption of the Constitution by the several States of the Union, and the establishment of the government of the United States, the States may still exercise any power of a political nature which has not been delegated by them, through the Constitution, to the United States, and that authority to exercise any power, on the part of the federal government, is to be determined alone, by a consideration of the question, as to whether such power be delegated to the United States, or prohibited to the several States or to the people, under the Constitution.

In accordance with this doctrine, therefore, under the operation of the dual system of government established by the Constitution, some of the powers of government in

*Const., U. S., Amendment X.

this country may undoubtedly be exercised by the States to the exclusion of the federal authority, while others may be exercised by the general government, exclusive of any authority, on the part of the several States.

However, there are said to be certain powers known to the Constitution, which arise from the relation established by that instrument between the several States and the United States, as a whole, as well as from the nature of their respective governments. These powers have been usually denominated concurrent powers, which are such powers as may be exercised by both governments, at the same time, and upon the same subjects, and those powers, which are of a local, temporary or subordinate nature, which may be exercised by the States, but only so long as the general government may see proper to withhold its paramount authority over the subject-matter of the power.

Based upon these considerations, therefore, it has been customary to divide all the powers of government, under the federal system prevailing in this country, into four general classes, *viz.*: Those powers which belong exclusively to the several States; those which belong exclusively to the general government; those which may be exercised concurrently by both the States and the United States, and those which may be temporarily exercised by the States, but only until Congress, by some direct action, assumes the exercise of the power in behalf of the federal government.

Consequently, in determining the exclusiveness of the authority of the federal government, in its application to

the commercial power of Congress, the following questions have received the consideration of the courts: (A) Whether, under the Constitution, the power to regulate commerce be exclusively in the States? (B) Whether this power be vested exclusively in the federal government? (C) Whether it may be exercised concurrently by the States and by the federal government? and (D) Whether this power, as delegated to the general government, may, in any case, be exercised by the States temporarily until Congress shall see fit to control the subject-matter of the power, by the actual exercise of its paramount authority over the subject?

A.

Of those powers, which belong exclusively to the States, it may be said, generally, that they are all those inherent powers of sovereignty, as before suggested, which reside in the several States by virtue of their condition as separate political communities, capable of independent self-government, and which were not surrendered to the government of the United States, by the several States, when the Constitution was framed and adopted. The right of the several States to the unimpaired exercise of these powers is, therefore, derived from their political condition, prior to, and at the time of the adoption of that instrument, and from the very nature of their sovereignty, as independent States.

Therefore, when the Constitution is silent as to the existence of any power, that power remains with the

States, unimpaired by the grant of any other power, and may, in all cases, be exercised by them to the exclusion of any authority on the part of the United States.

The mere statement of these principles in connection with that clause of the Constitution which vests in Congress the power to regulate commerce shows, that the terms in which this power is vested in the legislative department of the federal government, are such that the power is not one belonging exclusively to the States, because there is an express delegation of the power to that body, and it would be impossible, under any rule of correct reasoning, to predicate the existence of an exclusive power in the States, in any case, where the very power in question is expressly delegated to the federal government, whatever may be the extent of the authority of that government, in the exercise of the power so delegated. However, it may be stated, as a general principle of constitutional interpretation, that the mere grant of a power to the federal government does not of itself imply a prohibition to the States to exercise the same power.*

There is nothing, however, in the language of that clause of the Constitution, vesting in Congress the power to regulate commerce, to indicate that the power is vested exclusively in the general government, and therefore, under the operation of the principle just stated, the States may still exercise the same power, unless the exclusiveness of the power in that government, may be

*Sturges v. Crownenshield, 4 Wheat., 122; Houston v. Moore, 5 id., 1; see also, New York, New Haven & Hartford Railroad Co. v. New York, 165 U. S. 628 (631).

shown to exist, for some reason, other than that it has been so delegated, by the express terms of the Constitution; for, notwithstanding the grant of a power to Congress, in express terms, it does not necessarily follow, that that body is vested with exclusive authority over the subject-matter of the power; and, therefore, the States may still exercise the same power, unless, for other reasons, the prohibition to the States is fairly or necessarily implied. Nevertheless, it has been often asserted that the commercial power of Congress is exclusive, and that no part of this power may be exercised by the States.*

B.

Generally speaking, there are four ways in which an exclusive power in the federal government may arise. These are: Where the power is granted, in exclusive terms; where the States are expressly prohibited to exercise a power, delegated to the federal government; where the power is exclusive in its nature, and its exercise would legitimately admit of only a single and national rule, and, where the terms in which the power is granted are such as to show, that state legislation, on the subject-matter of the power, would be repugnant to the federal grant, or that the framers of the Constitution intended, that the power should be exclusively exercised by Congress.

Examining the subject more closely, in reference to the

*Passenger Cases, 7 How., 283 (411) *per* Wayne, J., Graves, *et al.*, v. Slaughter, *et al.*, 15 Pet., 449 (505), *per* McLean, J.

commercial power of the general government, it will be found, that the power to regulate commerce is not granted to Congress, in exclusive terms; that the Constitution nowhere expressly prohibits the States from exercising the same power, and it nowhere affirmatively appears, that the terms in which the grant is made, are necessarily of such a nature as to show, that state legislation on the subject would be repugnant to the federal grant, or that the framers of the Constitution intended that the power should be exercised exclusively by Congress.* If, therefore, the regulation of commerce be exclusively vested in the legislative department of the federal government, it must bear the other test of exclusiveness,† and be so from

*Notwithstanding the claim that the general language, in which the commercial power is granted to Congress, is sufficient to show that the federal government is vested with an exclusive authority over the subject, in all cases, it will be remembered that the Constitution itself recognizes some power, on the part of the States, when it declares, that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be necessary for executing its inspection laws." For the execution of these laws, therefore, the several States may even lay an impost or duty upon commerce, in so far as this may be necessary for that purpose; and, of this necessity the States are presumably to be regarded as the sole judges. But, in this connection, it must not be forgotten that this power which is reserved to the States, while absolute in terms, is not to be used for any other purpose than that of enforcing their inspection laws; and this is amply guarded, in the same section of the Constitution, by the further provision that "the net Produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." Const. U. S., Art. I., sec. X., cl. 2.

†Welton v. Missouri, 91 U. S., 275; Henderson v. Wickham, 92 id., 259; County of Mobile v. Kimball, 102 id., 691.

the nature of the power itself, because this is the only remaining source from which such exclusiveness can possibly arise; and, if the several States be excluded from the exercise if this power, it must be so, because the nature of the power, thus delegated to Congress, requires that a similar authority should not be exercised by the States.*

A resort to the nature of a power, as a means of constitutional interpretation, is based wholly upon the doctrine of implication, and such a mode of construction becomes necessary on account of the general terms in which the powers granted to the United States, by the Constitution, are expressed; and, as applied to powers, generally, the doctrine is that the grant of any power carries with it all that is necessary to the full, proper and complete enjoyment of the power expressly granted, in order to carry out the beneficial purposes of the grant; and any power which has been expressly granted must include whatever is indispensably necessary to its enjoyment.

Therefore, when a power may be legitimately implied from an express power, the power so implied is as important in determining the extent of the operation of the power, upon which the implication rests, as the words of the instrument in which the principal power is granted;† and, when this is ascertained, by logical rules of construction, a power which arises by implication is as effectual as an express declaration would have been, had it been made in the instrument itself; and, in order to determine

*Cooley v. Board of Wardens, 12 How., 299.
†Prigg v. Pennsylvania, 16 Pet., 539.

the extent of an implied power, the nature of the principal power, and the object sought to be attained by the grant are always subjects for judicial consideration.

These are familiar principles of the common law, and are fully recognized, in their application to all classes of powers, whether they be private, corporate, governmental or constitutional in their nature, the object of the doctrine of implied powers, being to rectify the common defects of language, and to secure the beneficial enjoyment of that which is imperfectly expressed. Therefore, whenever from the Constitution of the United States a clear intention to vest a power exclusively in the federal government may be discovered, its exclusiveness may be implied, from the nature of the power so vested in that government, as determined by the object sought to be attained by the grant.

A power which is exclusive in the United States, by reason of the nature of the subject-matter of the power, and not by the express terms of the Constitution, is, therefore, necessarily one which may be exercised only by virtue of the nature of the subject; because the nature of a power always depends upon the nature of the subject upon which it is intended to operate.* Familiar instances of this are all those powers which concern the intercourse of the United States with each other, and with foreign nations, and which, as has been said, necessarily concern the whole country collectively and no part of it in particular; and, as applied to the commercial power, when the nature of the power is referred to, as a

*Cooley v. Board of Wardens, 12 How., 299.

test of exclusiveness, it embraces that class of legislation of a general nature affecting the commercial interests of all the States, which, from its essential character is national, and which, so far as it affects these interests belongs exclusively to the federal government.*

So far, therefore, as the foreign commerce of the United States is concerned, it has been said, that from the nature of the subject, the power of Congress to regulate this branch of commerce, is necessarily exclusive,† because of the unrestricted authority of the federal government over the foreign relations of the United States.

Undoubtedly, one of the primary objects sought to be attained in the establishment of the federal government, was to provide means for a unity of action on the part of the several States, in their international intercourse, and so far as regards their foreign relations, to make them one people and one nation, and, consequently, to cut off all communications between foreign governments and the several State authorities, acting in their individual capacities, as independent States;‡ therefore, under the Constitution, the several States have no foreign relations.§ For this reason, it has been held, that whatever regulations foreign commerce should be subject to, in the ports of the Union, the general government would be held responsible for, and that all other regulations except those which

*Hinson v. Lott, 8 Wall., 148.

†Gibbons v. Ogden, 9 Wheat., 1 (228), *per* Johnson J.

‡Holmes v. Jennison, *et al.*, 14 Pet., 540.

§Passenger Cases, 7 How., 283 (551), *per* Woodbury, J.; see also Henderson v. Wickham, 92 U. S., 259; Bowman v. Chicago & Northwestern Railroad Co., 125 U. S., 465.

Congress may impose, would be regarded, by foreign nations, as trespasses and, therefore, in violation of national faith and comity.*

But, it is evident, from a reading of the Constitution, that the exclusiveness of the power of the federal government, over the foreign relations of the Union, does not arise from the grant of the commercial power to Congress,† since that power is expressly derived from the authority of the constitutional authorities of the United States to make peace and declare war; from its treaty-making power, and from its exclusive right to send and receive ambassadors and other public functionaries; and, the intercourse of the United States with foreign nations, in the exercise of these powers, is exclusively with governments and public authorities, and has no connection with private persons, in their capacity as such, whether they be immigrants or passengers, or travellers, by land or water, from a foreign country.‡

The exclusiveness of the authority of the federal government over the foreign relations of the United States, therefore, does not arise from the commercial power of Congress; but, it comes directly from those other powers, the all comprehensive one of which is the treaty-making power, the exercise of which is not only exclusively vested in the United States, but also prohibited to the States, by the express provisions of the Constitution,§

*Gibbons v. Ogden, 9 Wheat., 1 (228), *per* Johnson, J.
†Id., *per* Johnson, J.
‡Passenger Cases, 7 How., 283 (494), *per* Taney, C. J.
§See Const. U. S., Art. I., sec. X., cl. 1; Art. II., sec. II., cl. 2; Art. III., sec. II., cl. 1; Art. VI., cl. 2.

a circumstance which is not common to the commercial clause of that instrument.

A treaty is defined to be a compact between sovereign nations, and is considered a rule of reciprocal obligation.* It depends, for the enforcement of its provisions, on the interest and honor of the respective governments which are parties to it. If these fail, its infraction, by either party, becomes the subject of international negotiation and reclaimation, so far as the injured party chooses to seek redress, which may, in the end, be enforced by actual war.†

Like that of other nations, the treaty-making power of the United States undoubtedly extends to all the usual subjects of diplomacy between nations;‡ and these are necessarily determined by the comity of nations, and the application of the general principles of international law. And, the subject-matter of such diplomacy relates to the usual questions of peace and war; the surrender of prisoners; the cession of territory and the various other subjects which are usually embraced in such compacts between sovereign nations having international relations with each other.§

However, the treaty-making power of the United States is by no means unlimited in its extent and field of operation. This power is granted to the federal government in general terms, without an enumeration of the objects intended to be embraced in it, and, consequently, it was

*Cherokee Nation v. Georgia, 5 Pet., 1 (45), *per* Baldwin, J.
†Eyde v. Robertson, *etc.*, 112 U. S.., 580.
‡United States v. 43 Gallons of Whiskey, 93 U. S., 188.
§Cherokee Nation v. Georgia, 5 Pet., 1 (60), *per* Thompson, J.

designed to include only those subjects, which in the ordinary intercourse of nations, had usually been made the subjects of negotiation and treaty, and which were consistent with our institutions and the distribution of powers between the general and the state governments.* Hence, the treaty-making power of the United States, in order to be legitimately and constitutionally exercised, must be employed, in full recognition and subordination to the constitutional powers of the several States; because, although the treaty-making power, in carrying out the purposes and designs of the framers of the Constitution, excludes the States from all intercourse with foreign nations, still, this power is of no higher order than any other, the powers of the federal government, and, like these, the treaty-making powers must be exercised in full recognition and subordination to the constitutional rights of the several States.

A treaty between the United States and a foreign nation, therefore, cannot annul a state law rightfully and constitutionally enacted, and in reference to matters within the power of its Legislature; and, neither can Congress, by legislation enlarge federal powers and jurisdiction, nor can this be done under the treaty-making power.† Hence, it has been held that a treaty, no more than an ordinary statute, can cede away the rights of a State, nor any of its citizens.‡

But, while a treaty, between the United States and a

*Holmes v. Jennison, *et al.*, 14 Pet., 540 (569), *per* Taney, C. J.
†Mayor, *etc.*, of New Orleans v. United States, 10 Pet., 662.
‡License Cases, 5 How., 504 (513), *per* Daniel, J.; see also Passenger Cases, 7 How., 283 (507).

foreign nation, cannot annul a statute, rightly and constitutionally enacted by the Legislature of a State, in reference to matters within its constitutional power, if the subject of the treaty be the subject of international diplomacy it may contravene the statute of a State and still be not objectionable. This is so, not because the United States has any power to override the constitutional enactments of a State, but because a State statute interfering with any of the legitimate subjects of the treaty-making power of the federal government, transcends the constitutional power of the State, and, for this reason, is invalid and of no effect.

Therefore, the solution of the question as to whether the power of Congress to regulate the foreign commerce of the United States be exclusively vested in the general government, upon principles underlying the treaty-making power, depends upon the question, whether the regulation of commerce is one of the recognized and usual subjects of diplomacy and negotiation between nations; and, if this be so, whether the power to regulate commerce, by means of treaties, is a power granted to the federal government by the Constitution.

Among commercial nations, the regulation of trade is generally considered to be a legitimate subject of diplomacy, and, as such, may fall within the province of an ordinary treaty-making power; but, from this, it does not necessarily follow, that the regulation of foreign commerce, in this country, falls within the treaty-making power of the United States. This is so, because, the powers of the United States are limited, and must always

be exercised in subordination to the constitutional grant, under which they are claimed. Therefore, in order to determine whether the foreign commerce of the United States may be regulated by treaty, the Constitution must needs be the only guide.

An examination of that instrument will show, that the commercial power of the United States is vested alone in Congress, representing the entire legislative department of the federal government, while the power to make treaties is vested in the President, by and with the advice and consent of the Senate; and, from this it is clear, that, if the regulation of foreign commerce may be effected, by the exercise of the treaty-making power, the President, with the concurrence of two-thirds of the Senators present, would be enabled to exercise a power which is expressly vested by the Constitution in Congress, as a whole. The commercial power of Congress is, therefore, not embraced within the treaty-making power of the federal government, and this being so, it would be equally as illogical to contend, that this power might be exercised by the Supreme Court, representing the judicial department of that government. In either case the act would be condemned, as an unauthorized and unconstitutional usurpation of powers, by one department of the government, which are expressly delegated to another.

When, therefore, it is said, that commercial regulations, on the part of the federal government, fall within the treaty-making power, it can only be meant, that, in the making of treaties, the President, as the federal Executive, may, by and with the advice and consent of the

Senate, incorporate in treaties the provisions and policies of a prior law of Congress relating to commerce; and, that the validity of such treaties, as the embodiment of a system of commercial regulation, between the United States and foreign countries, must depend primarily upon the provisions of an act of Congress, in pursuance of which the treaty is made; for laws which concern the exterior relations of the country with other nations and governments are general in their nature, and should proceed from the legislative authority of the nation.*

But, when, either by silence or non-action, Congress has seen fit to leave the commerce between the United States and foreign nations free from all legislative regulation, it is clearly within the power of the President, in the exercise of the treaty-making power, to embody the principles of this freedom, in all treaties made, by him, with foreign nations. This would not impugn the power of Congress to regulate such commerce, nor enlarge the treaty-making power, beyond its constitutional limits. It would only be the declaration of a rule of comity, which is one of the inherent attributes of national sovereignty, subject to be modified by proper authority when the interests of the government demand a change. And, such a change may be accomplished by legislative action, for, as was declared, by *Mr. Justice Field,* in the case *Chae Chan Ping,* against the *United States,* while a treaty is in its nature a contract between nations, and is often merely promissory in character, requiring legislation to carry its stipulations into effect, such

*Bowman v. Chicago & Northwestern Railroad Co., 125 U. S., 465 (482).

legislation is open to future repeal and amendment; and, if the treaty operate of its own force, and relates to a subject within the power of Congress, it may be deemed, in that particular, only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress, and, in either case, the last expression of the sovereign will must control.*

Unlike the commercial power, the treaty-making power is exclusively vested in the United States;† and, while many of the principles underlying the exclusiveness of the treaty-making power apply necessarily to the commercial power, inasmuch as they both relate to that federal unity, which it was the great design of the Constitution to establish, still, it by no means follows, that, for this reason, the power to regulate commerce is vested exclusively in the United States, because, the two powers are not co-terminous in their effect and operation.

Indeed, the contrary is true; for, the very nature of the subject of the commercial power is such as to preclude the idea of its exclusiveness in the federal government; and, the principle is well established, that there must necessarily be some subjects of a local character, connected even with foreign commerce, which are beyond the scope of the federal power, and therefore, subject to the regulation of the several States.

This question was elaborately discussed, by counsel, in

*Chae Chan Ping, v. United States, 130 U. S., 581 (600); see also, Horner v. United States, 143 U. S., 570; United States v. Lee Yen Tai, 185 U. S., 213.

†Fong Yue Ting, *etc.*, v. United States, 149 U. S., 698 (706); Knox v. Lee, 12 Wall., 457.

the leading case of *Gibbons* against *Ogden*,* in which he undertook to show the necessity as well as the wisdom of the rule, upon which it is based, by saying:—"It is the only safe and practical rule; it is one which the extent of our territory would indicate, even if the government were despotic. In China, the Mandarins of provinces must be entrusted with some subordinate authority to make commercial regulations, adapted to local circumstances. With us, the peculiar nature and principles of our free and federative government, make the existence of such subordinate legislation more prudent and politic. There must be even in respect of foreign commerce, local interests and details which cannot be presented to the view of Congress, and can be, at least, better provided for by the State Legislature, emanating from the very people to whom they relate. This must have been perceived by the framers of the Constitution, and they must have felt the difficulty of designating the limits of what ought to be permitted to State authority. They did not, therefore, attempt the limitation, except in some plain cases, which they marked by restrictions and prohibitions."

The application of the principles contended for, in this argument of counsel, to the case then under advisement, did not require a full consideration, by the court, and, in its decision, it went only so far as to determine, that the Act of the Legislature of the State of New York, upon which the case arose, was repugnant to that clause of the Constitution, which authorizes Congress to regulate commerce, so far as the Act prohibited vessels, licensed ac-

*9 Wheat., 1 (101).

cording to the laws of the United States, for carrying on the coasting trade, from navigating the waters of that State by steam vessels. But, the question has been fully considered in subsequent cases, and the principle is now well established, that, when the subjects of the commercial power are local, in their operation, or constitute mere aids to commerce, the respective States may provide for their regulation and management, at least, until Congress intervenes and supersedes their action, by such legislation, as that body may deem appropriate to the subject.*

The consideration of this subject might be continued further; but, enough has been said to show, that, the commercial power of Congress, even in respect to foreign commerce, is not *per se* exclusively vested in the general government; and, that it is only exclusive, by virtue of the nature of the power, in those cases where a general or a national rule requires, that it should be so, or where the principles of international law, are to be observed in the relations of the United States with foreign nations.

But, inasmuch as a paramount and controlling authority over the whole subject, within the limits of the constitutional grant to Congress, is vested in the federal government, the extent of the exercise of any regulating power, by the several States must be determined by a consideration of this fact, and must depend upon a proper application of those principles which govern the States, in the exercise of their temporary powers, in respect to subjects of a local character, as well as those which underlie the

*Pound v. Turck, 95 U. S., 459; Cardwell v. American River Bridge Co., 113 U. S., 205.

legitimate exercise of their reserved power of taxation and police power, in so far as these well recognized powers, on the part of the States, may indirectly affect the federal power of commercial regulation.

The same, to some extent, is also true of commerce among the several States; for inter-state commerce, like foreign commerce, may be as varied as commerce itself, and its regulation may cover the whole commercial field, including the means, instruments and agencies by, and through which it is carried on.

Commerce among the States, like commerce with foreign nations, therefore, consists of intercourse and traffic between their citizens. It includes the transportation of persons and property, and the navigation of the public waters for that purpose, as well as the purchase, sale and exchange of commodities, where these are necessary to the exercise of the commercial power of Congress, and the power to regulate inter-state commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted, and to determine when it shall be free and when it shall be subject to duties or other restrictions. The power to regulate also embraces, within its control, all the intsrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of those, which are local and limited in their nature or sphere of operation, the States

may prescribe regulations until Congress intervenes and assumes control; yet, when they are national in their character and require uniformity of regulation, affecting alike all the States, the power of Congress is exclusive; and, necessarily, Congress alone can prescribe regulations which are to govern the whole country. Otherwise, it is said, there would be no protection against conflicting regulations of the different States, each legislating in favor of its own citizens and against those of other States; and that it was from apprehensions of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.* Therefore, the legislative department of the federal government has the unquestioned power under its authority to regulate commerce to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another.†

And, when a commodity has commenced to move as an article of trade or traffic between a place in one State and a place in another State, it denotes commerce between the States, and the means employed in moving it, from place to place, over every part of the entire line, is an employment in that commerce; consequently, the appeal in the case of the *Chicago & Northwestern Railroad*

*Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196; Dubuque & Sioux City Railroad Co. v. Richmond, 19 Wall., 584.

†Woodruff v. Parham, 8 Wall., 123.

Company against *Fuller** was based upon the constitutional proposition, that from the moment of the consignment of goods from one State to another, the goods themselves, and everything pertaining to their transportation, including compensation, is commerce between the States, and, as such, is not subject to state legislation, in any of its branches, until fully delivered to the consignee, and that, when consigned such goods cease to form items in the common mass of property in the State where the shipment was made, and until delivered and introduced into the common mass of property in the State to which it is consigned, does not fall within the operation of the laws of the several States.

In considering the subject of the exclusiveness of the power of Congress over inter-state commerce, it will, however, be well to remember that, prior to the adoption of the Constitution, the low condition of trade and the serious embarrassments which had arisen throughout the country respecting its regulation, demonstrated the necessity of some practical means for its control, by the general government, free from the conflicting legislation of the several States; and that, so far as the nature of the subject is concerned, the same reasons, which influenced the framers of the Constitution to recommend the delegation of the power to regulate foreign commerce, to the federal government, induced them to incorporate, in their plan of government, the power to regulate commerce, among the several States, the only difference being that the one concerned the establishment of a mode of united

*10 Wall., 557.

action, in the international relations between them and foreign nations, while the other was based upon the necessity of an harmonious relation among themselves.

In either case, uniformity of regulation was the main object sought to be attained; and the commercial power in respect of foreign and inter-state commerce was granted to Congress to insure this uniformity, the purpose of the grant being to place the commerce of the country beyond interruptions and embarrassments arising from conflicting and hostile state regulations.*

Consequently, it has been said that, in matters of inter-state commerce, the United States are but one country, and are, and must be, subject to one system of regulation, and not to a multitude of systems,† which is the announcement of a doctrine as applicable to foreign as it is to inter-state commerce.

Being one country, and necessarily subject to one system of regulation, commerce among the States must be considered as a whole, and the federal power of regulation cannot stop at the boundary line of the several States. It must extend to the interior of every State, and comprehend in the field of its operation, not only that commerce, which is introduced into a State from without, but also that which arises in one State, and passes into another, as well as that which passes through a State upon a continuous voyage, irrespective of the question as to whence it came, or what may be its destination, "because the authority of the United States, within the

*Southern Steamship Co. v. Masters and Wardens, 6 Wall., 31.
†Robbins v. Shelby County Taxing District, 120 U. S., 489.

limits of its constitutional powers, extends over the whole Union."*

In contravention of this doctrine, however, it has been contended, that commerce among the States means a voyage from State to State, commencing in one State and terminating, so far as the authority of a license from the United States goes, at the boundary line of the State where the voyage began; and, that the subsequent progress of the voyage then becomes the subject of the regulation of the next State in whose territory it is continued. But the fallacy of this contention becomes apparent in its naked statement; for, if the argument upon which it is based were sound, the result would be, that a vessel making a voyage from a port in one State must navigate subject to the regulation of the State, in which she commences her voyage, until she touches the boundary line of that State, and, at the moment she leaves its jurisdiction and enters the jurisdiction of another, she then navigates subject to the regulation of the State, so entered, until she completes the voyage. In such a case, the vessel would be under the control of state regulations during the whole voyage, and Congress would be ousted of its jurisdiction altogether.† The effect of such a doctrine, it is plain to be seen, would be, that one State could establish, at pleasure, a policy of non-intercourse with other States, and thus defeat the main object of the estab-

*Kidd v. Pearson, 128 U. S., 1 (17). See also, Crandall v. Nevada, 6 Wall., 35; Philadelphia & Reading Railroad Co. v. Pennsylvania, 15 id., 232; Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 U. S., 557; Fargo v. Michigan, 121 id., 230.

†Gibbons v. Ogden, 9 Wheat., 1.

lishment of the federal government, so far as the regulation of inter-state commerce is concerned.

Such a result would not only plainly contravene the commercial power of Congress, but would also be, in a measure, in violation of that other clause of the Constitution, which guarantees to the citizens of each State all the privileges and immunities of citizens of the several States; and hence, it has been very pertinently said, that such action, on the part of the States, would be repugnant to the Constitution, and would strike at the Union itself.*

This subject was thoroughly discussed, its result was clearly pointed out, and the true doctrine, in its application to inter-state commerce, was laid down, in the case of *The Daniel Ball* against the *United States*.† The plaintiff, in that case, was the owner of a steamer called the Daniel Ball, plying exclusively in the waters of the State of Michigan; the goods, in question, received by the plaintiff, for transportation, were destined and marked for other States, and the steamer was likewise engaged in transporting, up the Grand River, goods brought within the State of Michigan from without its limits. Upon these facts, it was contended, by counsel, that, inasmuch as the agency of the steamer, in the transportation, was entirely within the limits of the State of Michigan, and since she did not run in connection, or in combination with any other line of vessels or railroads leading to other States, she was, therefore, engaged en-

*Graves *et al.* v. Slaughter, *etc.*, 15 Pet., 449.

†10 Wall., 557.

tirely in domestic commerce, and was not subject to the regulating power of Congress. To the correctness of this contention, however, the Supreme Court of the United States, before which the question came for determination, refused to give its assent; for, in delivering its opinion, the court said that, so far as this steamer was employed in transporting goods, destined for other States, or goods brought from without the limits of the State of Michigan, and destined for places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress; that she was employed as an instrument of that commerce, for whenever a commodity has begun to move as an article of trade, from one State to another, commerce in that commodity between the States has commenced, and the fact, that several different and independent agencies are employed in transporting the commodity, some acting entirely within one State, and some acting through two or more States, does, in no event, affect the character of the transaction. To the extent to which each of such agencies acts in that transportation, it is subject to the regulation of Congress. If, it is concluded, the authority of Congress do not extend to an agency engaged in such commerce, when that agency is confined in its operations, within the limits of a single State, its entire authority, over inter-state commerce, may be defeated. Several agencies combining, each taking up the commodity at the boundary line, at one end of a State, and leaving it, at the boundary line, at the other end, the

federal jurisdiction would be entirely ousted, and the constitutional provision, vesting in Congress the power to regulate commerce among the several States, would become a dead letter.

Hence, when a common carrier voluntarily engages in inter-state commerce, by making an arrangement for a continuous carriage or shipment of goods and merchandise, it becomes subject to the regulation of Congress, and, in so far as such traffic is concerned, the provisions of the Act of Congress, establishing the Inter-state Commerce Commission, apply.*

And, the doctrine is well established that, while such property is in transit, and is the subject-matter of inter-state commerce, it is entirely under the protection of the Constitution of the United States; and, wherever commerce among the States goes, the power of the nation goes with it to protect and enforce its rights;† so, when the subject of inter-state commerce is property, and that commerce is of a national character, and requires uniformity of regulation, affecting all the States alike, the power is exclusive in Congress, and the States can do no act with respect to such commerce, when it is carried on by corporations or individuals, which will operate as a burden on the inter-state business of the company or

*Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railway Co., 167 U. S., 633 (642); Cincinnati, New Orleans & Texas Railway Co. v. Interstate Commerce Commission, 162 U. S., 184.

†Hall v. De Cuir, 95 U. S., 485.

individual, or impair the usefulness of their facilities for inter-state traffic.*

The power to regulate commerce among the States is vested in Congress, in terms as absolute as those, which delegate to that body, the power to regulate commerce with foreign nations; and, therefore, it has been holden that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations;† and, for the same reason, no State may pass any act affecting such commerce, although it purports to operate within the limits of the State, provided, however, that the state regulation, complained of, be of such a nature as to fall within the implied constitutional inhibition, and requires the application of what may be considered the general or national rule.‡

And, it has been said, that it is practically impossible to separate the regulation of foreign commerce and domestic commerce among the States from each other, for the reason, that the same policy applies to each, and not a reason can be assigned for confiding the power over the one, which does not conduce to establish the propriety of conceding the power over the other; and that the importance of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with foreign nations.

But, it has been contended that, notwithstanding the power to regulate commerce with foreign nations and

*Cardwell v. American Bridge Co., 113 U. S., 205; Stone v. Farmers' Loan & Trust Co., 116 id., 307.
†Brown v. Houston, 114 U. S., 622.
‡Hall v. De Cuir, 95 U. S., 485.

among the several States is delegated to Congress, in the same section of the Constitution, and in the same language, nevertheless, it does not necessarily follow that the power to regulate both classes may be exercised to the same extent; and this position was taken by *Mr. Justice McLean,* in the *Passenger Cases,* who bases his argument upon the same considerations as those which are given to support the identity of the power of Congress to regulate both foreign and inter-state commerce, when he holds, that the United States is considered as a unit in all regulations of foreign commerce, but not so, when the regulations are to operate upon commerce among the several States. But, however this may be, it is clear, that commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it has often been found difficult to regard them in the same aspect, in reference to the respective constitutional powers and duties of the state and federal governments.

This difference was clearly stated, and the reasons for it, were tersely given, by *Mr. Justice Bradley,* in the case of the *Baltimore & Ohio Railroad Company* against *Maryland,** when he said:—"No doubt commerce by water was primarily in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well." For, said he, "Maritime transportation requires no artificial roadway. Nature has prepared, at hand, those portions of the instrumentality employed. The navigable waters

*21 Wall., 456.

of the earth are recognized public highways of trade and commerce. No franchise is needed to enable the navigator to use them. Again: the vehicles of commerce by water being instruments of inter-communication with other nations, the regulation of them is assumed by the national Legislature. So, that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads and in vessels drawn by animal power. No one, at that day, imagined the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair and management, to state regulation and control. They were all made, either by the States, or under their authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn were subjects of national legislation. The movement of persons and merchandise, so long as it was free to one person as to another, to the citizens of other States as to the citizens of the State in which it was perfomed, was not regarded as unconstitutionally restricted and trammelled by tolls, exacted on bridges or turnpikes, whether belonging to the State or to private persons. And when, in process of time, canals were constructed, no amount of tolls which was exacted thereon, by the State, or the companies that owned them, was

ever regarded as an infringement of the Constitution. When constructed, by the State itself, they might be the source of revenues, largely exceeding the outlay, without exciting even the question of constitutionality. So, when by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all absorbing transportation, no one imagined that the State, if itself owned the work, might not exact any amount whatever of toll, or fare, on freight, or authorize its citizens or corporations, if owners, to do the same."

But, in delivering a dissenting opinion, in a case* where the validity of an act of the Legislature of the State of Pennsylvania was the subject of litigation, the same learned justice said, "to contend that there was any difference between cars, or trains of cars, and ocean steamships," in regard to the power of Congress to regulate commerce, "is to lose sight of the essential qualities of things."

However, since no exclusive power to regulate commerce, in any of its branches, is vested in the federal government in express terms, and since the Constitution contains no prohibition upon the exercise of such a power by the States, any argument for exclusiveness over the matter, either in respect of foreign or inter-state trade, must necessarily be based upon the reason, from which it arises. "So far as the reason exists," says *Mr. Justice Woodbury,* in delivering a separate opinion in the *Passenger Cases,* "to make the exercise of the commercial

*Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18 (32).

power exclusive, as on matters of exterior, general and uniform cognizance, the construction [placed upon the commercial power of Congress by other members of the court in those cases] may be proper to render it exclusive, but no further, as the exclusiveness depends in this case wholly on the reasons and not on any express prohibition, and hence cannot extend beyond the reasons themselves. Where they disappear the exclusiveness should halt. In such case, emphatically, *cessante ratione,"* says he, *"cessat et ipsa lex."**

And, in all cases where the exclusive power of the federal government over inter-state commerce is claimed, it is not enough to establish as a fact, upon which the claim is based, that the instrumentality by which such commerce is carried on, in the State, is used in aid of inter-state commerce. Any state legislation of this kind, to be unconstitutional must be such as will necessarily amount to, or operate, as a regulation of business without the State as well as within.†

The relation existing between the United States and the Indian tribes, dwelling within its territory and subject to its jurisdiction, is anomalous in its character; and, therefore, the nature of the power of Congress to regulate the Indian trade is peculiar to itself, in so far, at least, as the nature of the power depends upon that relation.

In some respects, this relation is like that between the United States and foreign nations; and when this is so,

*7 How., 283 (559).
†Cardwell v. American Bridge Co., 113 U. S., 205.

the exclusiveness of the commercial power of Congress, as applicable to the Indian trade, is governed by the same principles as those which govern the foreign commerce of the country. In other respects, however, the relation is quite different, requiring the application of other principles, based upon the peculiar *status* of the Indians and the general policy of the federal government toward their respective tribes.

Except in that provision, which vests in Congress, the power to regulate commerce, the relation of the several States and of the United States to the Indians is nowhere expressly referred to in the Constitution. It is true, that the Articles of Confederation vested in the Congress full power of "regulating the trade and managing all affairs with the Indians, not members of any State," but the only direct reference to the subject at all, to be found in the present Constitution, is in the commercial clause of that instrument.

This provision of the Constitution, however, only relates to the regulation of the Indian trade, and has nothing to do with that other and more extensive power of "managing their affairs," which was vested in the old Congress by the Articles of Confederation, and which is now exercised, by the United States, to the fullest extent, although not expressly granted, by the Constitution.

The exclusive power of the United States to hold intercourse with the Indian tribes and to manage their affairs, not having been vested in that government by the commercial clause of the Constitution, it must of necescessity come from some other source of power. In order,

therefore, to ascertain what this may be, it is necessary to consider the powers of the federal government, in respect of the character of the Indian tribes, as nations, and as occupants of the territory within the geographical and territorial limits of the United States.

Examining the Constitution, with this end in view, it becomes apparent, that the authority exercised by the United States over the Indians can only be expressly derived from the commercial clause of that instrument, but, this as has been shown, is only partial, relating to trade alone; from the treaty-making power, in connection with those other powers, vested in the general government, which are directly dependent upon this power, or from the power of the United States over its Territories.

The treaty-making power of the United States, as a source of its authority over the Indian affairs of the country, becomes apparent, when the fact is mentioned, that, these tribes, in their relation with the United States, have always been considered as independent political communities,* although resident within its territory. But, whatever may be the extent of the power of the federal government, over the Indian affairs, from this source, the legislation of Congress, under the present Constitution, concerning the Indians, is said to have been in the same spirit, and the legislative department of the government has been guided by the same principles which prevailed in the old Congress and under the old Confederation.

*Delaware Indians v. Cherokee Nation, 193 U. S., 127; Cherokee Trust-Fund, 117 U. S., 288; Fargo v. Hart, id., 490.

These principles are said to have been inherited, by the colonies, from Great Britain; they were transmitted, by them, to the Congress, under the Confederacy, and, by the same authority, it is said, the power is now exercised by the federal government.

As independent communities, the Indian tribes of the United States have retained their rights, as undisputed possessors of the soil, from time immemorial. The very term "nation," so generally applied to them, signifies a people distinct from others; and, in the management of their internal affairs, the Indian tribes are dependent upon no other nation. Unless, therefore, restrained, by the paramount authority of the United States, these tribes may punish offenses, under their own laws; and, in so doing, they are amenable to no other tribunal, the policy of the government, in this respect, having always been to recognize, in the inhabitants of the Indian country, such power of self-government, as was thought consistent with the safety of the white population, with which they came in contact, in order to encourage them, as much as possible, to raise themselves to a higher standard of civilization.*

So, as nations, they make war and enter into treaties of peace. The exercise of these, and other rights of a similar nature, give them a distinct character, and constitute them, in some respects, at least, independent nations.

Recognizing such an independent character, on the part of the Indian tribes, particularly in respect to their power

**In re* Mayfield, 141 U. S., 107; see also, Talton v. Mayes, 163 U. S., 376; Nofire v. United States, 164 U. S. 657.

to make treaties, the United States holds intercourse with them, as it does with other nations. And, while they are not recognized as foreign States,* in the full acceptation of that term, still, they possess that character, to such an extent, as to render all intercourse with them exclusively of federal concern. Hence, all intercourse with the Indian tribes is carried on exclusively by the government of the United States,† or under its authority, and the several States for this reason, are excluded from all intercourse with them, upon the same grounds, that they are excluded from intercourse with foreign nations.

And, such is said to be the authority of the general government in the management of the Indian affairs, by treaty, that title to any part of the lands of the Indian tribe may be granted to any individual member of the tribe, by a treaty between it and the United States, without any act of Congress, or any patent from the executive authority of the United States, irrespective of the commercial power.‡

Therefore, the exclusiveness of the power of Congress to regulate that branch of commerce relating to the Indian trade, stands upon the same footing, as that of its power to regulate commerce with foreign nations, in so far as the nature of the power depends upon those principles, which underlie the general treaty-making power of the federal government.

*Holden v. Joy, 17 Wall., 211; Warner v. Joy, id., 253.

†Worcester v. Georgia, 6 Pet., 515; Eastern Band of Cherokee Indians v. United States, 117 U. S., 288; Cherokee Nation v. Southern Kansas Railway Co., 135 U. S., 641.

‡Jones v. Meehan, 175 U. S., 1.

Upon these principles it was, therefore, held, that taxes assessed by the State of New York, against the Buffalo Creek, Allegheny and Cataraugas reservations, in that State, were unconstitutional and void, they being in direct conflict with the tribal rights of the Seneca Nation, as guaranteed by its treaties with the United States.*

In recognizing in the Indian tribes such a national and independent character, as to render them capable of holding intercourse with the United States, in the ordinary mode of international dealings of one nation with another, however, it is not to be understood that these tribes possess that character to an unlimited extent.

And, referring to the Cherokee Nation, the Supreme Court of the United States has held, that, "the proposition, that the Cherokee Nation is sovereign, in the same sense, that the United States is sovereign, or in the sense, that the several States are sovereign, and, that that Nation alone can exercise the power of eminent domain, within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this Court, or in the Acts of Congress defining the relation of that people to the United States."†

Under the existence of the original States, as British colonies, experience had shown that the colonial relations with the Indian tribes was a matter of general concern, not only to the colonies, but also the British nation itself; and that, under the Confederation, before the

*The New York Indians, 5 Wall., 761.

†Cherokee Nation v. Southern Kansas Railway Co., 135 U. S., 641 (653).

adoption of the present Constitution, the only efficient method of dealing with these people was by placing them under the protection and regulation of the federal government. Their peculiar habits and character required this, and the history of the country, in the early stages of its development, demonstrated the necessity of keeping them "separate, subordinate and dependent."* Hence, it is that the Indian tribes, while they have always been recognized, in the laws and treaties of the United States, as nations, nevertheless they have been considered as dependent upon the federal government; and, on this account, have been often denominated "domestic dependent nations," holding a relation to the general government resembling that of guardian and ward.†

Growing out of this relation, therefore, all the powers of government possessed by the Indian tribes, as nations, are necessarily subordinate to the authority of the United States; and, by virtue of this condition of subordination, they are restricted, in their national or tribal intercourse; and, of course, can make treaties with no other power than that of the federal government; and, their laws must always be in conformity with such Acts as Congress may pass in their behalf.‡

Beside the power of the United States over the Indian tribes, growing out of the power to regulate commerce

*United States v. 43 Gallons of Whiskey, 93 U. S., 188.

†Cherokee Nation v. Georgia, 5 Pet., 1.

‡United States v. Rogers, 4 How., 566; Cherokee Tobacco Case, 11 Wall., 616; United States v. Kagama, 118 U. S., 375; *In re* Mayfield, 141 U. S., 107; Stephens v. Cherokee Nation, 174 U. S., 445; Cherokee Nation v. Hitchcock, 187 U. S., 294; Lone Wolf v. Hitchcock, id., 553.

and the treaty-making power, as has already been suggested, there is still another source, upon which the power of the general government to manage the Indian affairs of the country is based, and which is even more extensive in its operation, and exclusive in its nature, than either of the other two. This is that power which vests in Congress, authority "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."*

When the Articles of Confederacy were framed and adopted, the fact is, that the United States had no territory of its own, and, therefore, that instrument vested in Congress not only the power to regulate the Indian trade, but also, the power to manage all their affairs, provided, they were not members of any State. In the meantime, however, and before the adoption of the present Constitution, certain of the States ceded to the general government their outlying territory in the West, upon which the Indians were principally located, and the cession of these territories, as well as the delegation of the power to the federal government to make all rules and regulations respecting them, furnished a sufficient reason, if no other existed, for the omission of the "managing power," delegated to Congress, under the Articles of Confederation, from the present Constitution of the United States.

While, therefore, the federal government has always recognized in the Indian tribes a certain condition of national existence, and has dealt with them, as independent nations, it possesses, under its power to make rules

*Const. U. S., Art. IV., sec. III., cl. 2.

and regulations respecting its Territories, the right and authority to govern them directly by Acts of Congress, instead of establishing its relations, and governing them by treaty; because they are within the geographical limits of the United States; are occupants of its Territories, and are necessarily subject to such laws as Congress may, from time to time, enact for the government and management of these Territories, for the security of the several Indian tribes occupying them, and for the protection of those with whom they come in contact.* Therefore, the power to regulate the Indian relations of the country, whether they be commercial or otherwise, is vested exclusively in Congress,† because the power of Congress over its Territories is general and plenary;‡ it exists independent of the commercial power, and the States have no control, power or government over them, so long as the Indians maintain their distinct tribal relation. And, the authority of the United States over the Indian tribes, is so extensive and exclusive, that it is not limited to territory. It is so general in its nature, that its mere existence carries with it, the right to exercise the power, wherever there is a subject upon which it may operate, although within the limits of a State; and, in so far as the Indian trade is concerned, it extends to its regulation, even with the individual members of a tribe, so long as they maintain the tribal

*United States v. Kagama, 118 U. S., 375; Choctaw Nation v. United States, 119 U. S., 1; Cherokee Nation v. Southern Kansas Railway Co., 135 U. S., 641.

†Worcester v. Georgia, 6 Pet., 515.

‡Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S., 1; Binns v. United States, 194 U. S., 486.

relation. For, says the Supreme Court of the United States, in the case of the *United States* against *Holliday*,* "the locality of the traffic can have nothing to do with the power. The right to exercise it, in reference to any Indian tribe, or any person, who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe, with whom it is carried on."

However, the power of the United States over the individual members of an Indian tribe, is limited to those who live together, as a distinct community, under their own laws, usages and customs, and does not extend to the mere remnants of tribes, which are found in many parts of the country, and the members of which have become incorporated with the general population of the States, in which they reside; their national character extinguished; their usages and customs in a great measure abandoned; self-government surrendered, and, who have voluntarily, or by force of circumstances, gradually become a constituent part of the population of, and subject to the laws of the several States, within whose limits they are situated.† Under these circumstances, the authority of the general government ceases, and the power of the States over such individuals is the same as over other citizens within its borders, free from any extraordinary power of interference by the federal government.‡

*3 Wall., 407; United States v. 45 Gallons of Whiskey, 93 U. S., 188.

†Cherokee Nation v. Georgia, 5 Pet., 1,

‡Worcester v. Georgia, 6 Pet., 515; Eastern Band of Cherokee Indians v. United States, 117 U. S., 288.

Recurring again to the Constitution, as the only source of the commercial power of Congress, it will be found, that its language makes no distinction between the extent of the regulating power of the general government, over either of the three classes of commerce, covered by its provisions; and, for this reason, it has been held, that the power, whatever may be the extent of its operation, is equally broad and absolute over the one, as it is over the other.* But, from the very nature of the case, and the peculiar relations existing between the federal government and the Indian tribes, in virtue of the treaty-making power and the power to govern its own Territories, it is apparent, that, although the commercial power of Congress is equally broad, in so far as may be gathered from the express terms of the Constitution, nevertheless the power of the United States, to regulate the Indian trade, is, and must of necessity, be more extensive in its operation, than its power to regulate either foreign or inter-state commerce; because, it is complete, within itself, and exists independent of the commercial power.

As to foreign and inter-state commerce, it is also said, that the importance of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with foreign nations;† and, this must be so, because, the same reasons which govern the exclusiveness of the power, in the one case, apply in the other, whenever these arise from the nature of the power

*Hinson v. Lott, 8 Wall., 148; Walling v. Michigan, 116 U. S., 446.

†Brown v. Maryland, 12 Wheat., 419.

itself. But, it is evident, that no rule of exclusiveness, either in respect of foreign or inter-state commerce, may be predicated of the commercial power, when this depends solely upon the nature of the power itself. Hence, if the power over these two branches of commerce, be, for any reason, exclusive, in the federal government, it must be so, not from a mere delegation of the power alone, but because from the nature of the subjects upon which it operates, a general rule of regulation is required.

This conclusion arises from necessity, and is the result of the doctrine of implication, as applied to powers generally; and where such a rule is applicable to any of the powers of the federal government, the exercise of the power is said to be as exclusive, as it would be in a single government, having, in its constitution, the same restrictions on its exercise, as are found in the Constitution of the United States.* But, it is not always easy to determine what are those subjects of the power, which fall within the exclusive power of Congress, even under the operation of this rule of necessity, since, as has been said, almost all the business and intercourse of modern life may be, more or less, connected with commercial regulation;† and, the only safe rule seems to be contained in the proposition, that the exclusiveness of the power of Congress to regulate foreign and inter-state commerce, must be derived from the nature of the power, as ascertained by the causes, which lead to the framing and adoption of the Constitution, and, which may be embodied

*Gibbons v. Ogden, 9 Wheat., 1 (196).
†Id. (9), Mr. Webster of Counsel.

in that class of legislation of a general nature, which from its essential character is national, and, which, so far as it affects the commercial interests of the whole country, belongs exclusively in the federal government;* and this is so, because, as was said, by *Mr. Chief Justice Fuller,* "by the adoption of the Constitution, the ability of the several States to act upon the matter, solely in accordance with their own will, was extinguished, and the legislative will of the general government substituted,"† in its place.

Therefore, whatever subjects of the commercial power are in their nature national, and admit of only one uniform rule of regulation, may be justly said to be of such a nature as to require the exclusive legislation of Congress;‡ and the power is necessarily exclusive, whenever the subjects, upon which it operates, are national in their character, and admit of only one system or plan of regulation.§ And, for this reason, it has been held, that, "commerce with foreign nations and among the States, strictly considered, consists of intercourse and traffic,

*Cooley v. Board of Wardens, 12 How., 299; Hinson v. Lott, 8 Wall., 148.

†*In re* Rahrer, 140 U. S., 545 (561).

‡Cooley v. Board of Wardens, 12 How., 299; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S., 160.

§Gibbons v. Ogden, 9 Wheat., 1; Brown v. Maryland, 12 id., 419; Passenger Cases, 7 How., 283; Crandall v. Nevada, 6 Wall., 35; Ward v. Maryland, 12 id., 418; *Ex porte* McNiel, 13 id., 236; State Freight Tax Cases, 15 id., 284; Chicago & Northwestern Railroad Co. v. Fuller, 17 id., 560; Henderson v. Wickham, 92 U. S., 259; Hannibal & St. Joseph Railroad Co. v. Huson, 95 id., 465; County of Mobile v. Kimball, 102 id., 691; Gloucester Ferry Co. v. Pennsylvania, 114 id., 196; Walling v. Michigan, 116 id.,

including the term navigation, and the transit of property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country, and the authority which can act alone, for all the States, can alone adopt such a system."*

But, that uniformity of commercial regulation, which the grant to Congress was designed to secure, against conflicting State legislation, was necessarily intended only to apply where such regulation is practical.† Hence, the commercial power of Congress is held to be exclusive of State authority, only where the subjects, upon which it operates, are national in their character, and require uniformity of regulation, affecting alike all the States,‡ in their relation to each other, and to foreign nations.

In those cases, where a national rule is required to insure uniformity in the regulation of foreign and interstate commerce, under the principles just stated, the further doctrine has been announced, that the non-action or silence of Congress is as effectual to exclude the interference of State legislation, as direct or positive action would be; and, this is so, because the silence or non-action of Congress, in such cases, is tantamount to a declaration, that such commerce shall be free and un-

446; Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 id., 557; Robbins v. Shelby County Taxing District, 120 id., 489.

*County of Mobile v. Kimball, 102 U. S., 691; Welton v. Missouri, 91 id., 275; Robbins v. Shelby County Taxing District, 120 id., 489; Southern Mail Steamship Co. v. Pennsylvania 6 Wall., 31.

†County of Mobile v. Kimball, 102 U. S., 691.

‡Cardwell v. American River Bridge Co., 113 U. S., 205.

trammelled,* and, any regulation, on the part of the States, under these circumstances, is repugnant to that freedom, and is, therefore, void.†

Hence, it has been held, that no State can interfere with foreign or inter-state commerce or put obstructions upon it, without coming in conflict with the superior authority of Congress,‡ and, in those cases where the power of Congress is exclusive, it is so far exclusive, that no one of the several States may enact any law or regulation which will affect the free and unrestricted intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden upon the citizens or products of other States coming into, or brought within its jurisdiction.§

This being so, it follows that, as to those matters relating to commerce, which are vested exclusively in the federal government, the States have no power to supplement the action of Congress, even in respect of those tem-

*County of Mobile v. Kimball, 102 U. S., 691; Welton v. Missouri, 91 id., 275; Smith v. Alabama, 124 U. S., 465.

†Gibbons v. Ogden, 9 Wheat., 1 (222), *per* Johnson, J.; Passenger Cases, 7 How., 283 (462), *per* Grier, J.; State Freight Tax Cases, 15 Wall., 284; Hannibal & St. Joseph Railroad Co. v. Huson, 95 U. S., 465; Welton v. Missouri, 91 id., 275; County of Mobile v. Kimball, 102 U. S., 691; Brown v. Houston, 114 U. S., 622; Walling v. Michigan, 116 id., 446; Pickard v. Pulman Southern Car Co., 117 id., 34; Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 id., 557; Robbins v. Shelby County Taxing District, 120 U. S., 489; Corson v. Maryland, id., 502; Hall v. De Cuir, 95 U. S., 485; Brennan v. Titusville, 153 U. S., 289; Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S., 204 (212); Pittsburg & Southern Coal Co. v. Bates, 156 U. S., 577.

‡Harman v. Chicago, 147 U. S., 396 (406); *In re* Debs, 158 U. S., 564 (581).

§Pittsburg & Southern Coal Co. v. Bates, 156 U. S., 577.

porary and local subjects, which are admittedly within the jurisdiction of the several States. For, it is a general principle, that when Congress has the constitutional power to regulate any particular subject, and it does actually regulate it, in a given manner, and in a certain form, the Legislatures of the several States have no right to interfere, and, as it were, by compliment, prescribe additional regulations, which they may deem auxiliary provisions, for the same purpose; and, neither can the States subtract anything from the regulation of Congress, under the same circumstances.*

In such case, the legislation of Congress, in what it does prescribe, indicates, that it does not intend, that there shall be any State action on the subject; and the silence of Congress, as to what it does not do is as expressive, upon the point, as any direct provision it may make for this purpose.†

But, the silence of Congress, considered as a declaration of freedom, operates only when the power is exclusive in the federal government; and, therefore, it is to be respected and obeyed, only when the power is exclusive, and the States are deprived of all authority in the matter, by reason of its constitutional exclusiveness. And, for that reason, the power must be shown to be exclusive, before any inference can be drawn, that the silence of Congress speaks.‡

*Gibbons v. Ogden, 9 Wheat., 1 (197 *et seq.*); Mayor, *etc.*, of New York v. Miln, 11 Pet., 102 (158).

†Houston v. Moore, 5 Wheat., 1; Prigg v. Pennsylvania, 16 Pet., 539.

‡Passenger Cases, 7 How., 283 (559), *per* Woodbury, J.

So, it is said, that "the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject," and, is evidence of its opinion, that the matter may be regulated by local authority, and proof of its intention, that local regulations may be made, in the absence of congressional legislation;* and as to commerce among the States, it may be, that the same inference is not always to be drawn, from the absence of congressional legislation, as might be drawn, in the case of commerce with foreign nations.

But, on the other hand, it has been held that, since the absence of any law of Congress on the subject of foreign and inter-state commerce is equivalent to its declaration that it shall be free, it follows, "that as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does not amount to such exercise, or, in other words, what is, or is not, a regulation of such commerce."†

The extent of the power of Congress to regulate commerce, in any case, is, therefore, said to depend always upon the solution of the question, as to whether the power

*Smith v. Alabama, 124 U. S., 465 (477-8, 482); Bowman v. Chicago & Northwestern Railroad Co., 125 U. S., 465 (482).

†Leisy v. Hardin, 135 U. S., 100 (119).

is exclusive in that body; and, if this question be answered in the affirmative, then the power of Congress may be exercised, wholly independent of the States, and state jurisdictional lines.* And, in so far as the power is exclusive, it is entire, and precludes all action on the part of the several States; because the exercise of any such power of regulation, by the States, under the circumstances, or by any one or more of them, would conflict with the constitutional power of the United States to regulate commerce, and would measurably replace the States in their commercial attitude to each other, as it was after the Declaration of Independence, and under the Articles of Confederation.

Whenever, therefore, the exclusive exercise of the power of Congress to regulate commerce is predicated upon the nature of the subject-matter, upon which it is intended to operate, the power is complete, and cannot stop at the jurisdictional lines of the several States. If the rule were otherwise, it is apparent, that, it would be a useless power; and, for this reason, all state legislation in derogation of the power of Congress, in this respect, will be declared null and void.†

C.

A concurrent power in the state and federal government, as the term implies, presupposes its equal existence in both. Its existence in the one is, therefore, neces-

*Gibbons v. Ogden, 9 Wheat., 1 (194); Passenger Cases, 7 How., 283 (414).

†Passenger Cases, 7 How., 283 (504); Sinnott v. Davenport, 22 id., 227; Ward v. Maryland, 12 Wall., 418.

sarily independent of its existence in the other; but the exercise of such a power, by either the state or the federal government, does not imply joint-action on their part.

Although a concurrent power is sometimes referred to as a single power, existing at the same time in both governments, this cannot be logically true, because the existence of any power, in either government, must be entire; and it is evident, that two independent wills cannot operate upon the same subject, at the same time, and leave any *residuum* for the other to act upon. The action of the one must necessarily precede the action of the other, unless there be an arrangement between them for the joint-action of both, and that, which is first, must exclude the other. However, it has been said that such an arrangement cannot be predicated of a concurrent power in the state and federal governments, because they are supreme within their respective constitutional spheres of action, and the very idea of such a power in two distinct sovereignties involves a moral and physical impossibility.*

*Passenger Cases, 7 How., 283. The doctrine, that a joint arrangement between the State and federal government cannot be predicated of a concurrent power, as stated in the text, if ever accepted by the Supreme Court of the United States, is now discarded, for in several cases, recently decided by that Court, it has been expressly held, that under existing legislation, the right to erect a structure in the navigable waters of the United States, wholly within the limits of a State, depends upon the *concurrent* or joint-action of the State and national government. See Willamette Iron Bridge Co., v. Hatch, 125 U. S., 1; Cummings v. Chicago, 188 U. S., 410; Montgomery v. Portland, 190 U. S., 89.

From this, it has, therefore, been contended, that the existence of a concurrent power, in respect of any subject, in the state and federal governments, cannot and does not exist; but whatever may be the correctness of the reasoning in support of the argument, upon which this contention is based, the doctrine of concurrent powers, in the constitutional jurisprudence of this country, is too firmly established, at least so far as its terminology is concerned, to be seriously questioned, and the principle now seems to be well established, that a State may legislate in all cases of concurrent power, although Congress may have acted, under the same power, and upon the same subject, the only difficulty being to determine what is a concurrent power in both governments.

In this view of the subject, it is clear, that the power of levying and collecting taxes is a concurrent power;* and, as such, is constantly exercised by the state and federal governments. The States exercise this power in virtue of their inherent right of sovereignty; while the United States derives its power of taxation, from that clause of the Constitution, which expressly vests in Congress the power "to levy and collect taxes."† The exercise of the power of taxation is as vital and essential to the very existence of the States, as it is to that of the federal government; and, being so, the power of taxation remains, in the States, unabridged and unimpaired, except, in so far as as it has been expressly surrendered, by them, to the United States. With this exception, therefore, the

*Snyder v. Bettman, 190 U. S., 249.
†Const. U. S., Art. I., sec. VIII., cl. 1.

taxing power of the States, to the full extent of their territorial jurisdiction, is concurrent and co-extensive with the same power in the federal government. This power, in the States, applies to both persons and property, and may reach any object brought within their several jurisdictions, to any extent, within the discretion of the Legislature of each, and, other than this, its exercise knows no supreme law nor superior authority.*

So, the power to provide for the punishment of counterfeiting the securities and current coins of the United States, or of any foreign country, within the limits of the United States, is recognized as a concurrent power, which may be exercised, by the State, in which the offense may be committed, as well as by the United States; and the existence of this power, on the part of the States, has been distinctly recognized by Congress, for in all its early acts relating to coin and banknotes it is expressly provided "that nothing, in them contained, shall be so construed as to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over any offense made punishable by these acts;" and while Congress has, in the exercise of its constitutional power on the subject of counterfeiting, made statutory provisions for the punishment of the same class of offenses, there has been no question of the validity of the exercise of the same power, by either government.†

*McCullough v. Maryland, 4 Wheat., 316; Gibbons v. Ogden, 9 id., 1; Providence Bank v. Billings, 4 Pet., 514 (561); License Cases, 5 How., 504; Weston v. City of Charleston, 2 Pet., 449; Passenger Cases, 7 How., 283.

†4 U. S. Stat., 67.

But, in reference to crimes against the National Banking Act, the rule has been recently laid down that, while the State legislative power to define and punish crimes, by general laws, applicable to all persons, within its jurisdiction, is unquestioned, and in pursuance of this power, the State may declare, by special laws, certain acts to be criminal offenses, when committed by officers and agents of its own banks and institutions, it is without lawful power to make such special laws, applicable to banks organized and operated, under the laws of the United States.*

The power to provide for the organization, arming and disciplining the militia is also conceded to be a concurrent power, subject to be exercised by both governments, at the same time, since it rests upon the same principles as those which underlie the concurrent power of taxation and the punishment of counterfeiters.†

And, as another instance of a well established concurrent power, once of considerable importance, but now of little concern, may be mentioned the power to forbid the foreign slave trade. Although the Constitution limited the power of Congress to prohibit the importation of slaves, prior to the year 1808, the power was expressly recognized, as existing in both governments, subject only to the temporary restrictions contained in the Constitution, upon the power of the general government, both before and since that date, it having been always recognized, as a concurrent power to be exercised by

*Easton v. Iowa, 188 U. S., 220.
†Houston v. Moore, 5 Wheat., 1.

either the state or federal governments, as occasion required.*

Recurring to what has already been said, as to concurrent powers, in general, and the conflict of opinion as to the nature of this class of powers, it may be well to note, that the term concurrent, as applied to the powers of the state and federal governments, does not imply the existence of the same identical power in both. Were it otherwise, a fatal misconception in the use of the term would arise. Therefore, properly applied, the term concurrent, when used in reference to the powers of the state and federal governments, means only that the States and the United States, as separate sovereignties, have independent powers of the same character; and when it is said, that a concurrent power, respecting any subject, exists in the two, all that is meant is, that each possesses a separate and independent power, to be exercised upon the same subject-matter, when occasion arises, by either. This necessarily implies, that such a power is distinct in the two governments, or, perhaps, more accurately speaking, that there are two powers, one existing in each government, which are distinct and separate, in their nature, but coördinate in their operation, rather than that the power is the same, to be exercised by either government whenever it suits its will or convenience. Thus, if one passes counterfeit coins of the United States, within a State, the act is an offense against both governments. It is an offense against the United States, because it dis-

*Const. U. S., Art. I., sec. IX., cl. 1; Passenger Cases, 7 How., 283, *per* Woodbury, J.

credits the coin, and it is an offense against the State, because of the fraud, upon him, to whom it is passed. So, if a marshal of the United States be unlawfully resisted while executing the process of the federal courts, within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated, by the resistance, and that of the State by the breach of the peace, committed in the assault.*

To suppose, that any power is concurrent, in the two governments, upon any other theory of interpretation, would be to confound the true relation of the several States, to each other, and to the United States, as well as the nature and purposes of the whole federal system. This is apparent, for the reason, that all the powers of the federal government are co-extensive with its territory and constitutional jurisdiction; and, if any power, delegated to the United States, be susceptible of a concurrent exercise, by the States, it must necessarily follow that such exercise, by them, would be co-extensive with the scope of the power, and would operate beyond their territorial and local jurisdictions, which would, indeed, involve a moral, physical and constitutional impossibility.

To repeat, therefore, for the purpose of making the matter more clear, what has already been suggested, in order to be concurrent, the power must be capable of exercise, without conflict, by both governments; that is to say independently by each; and, to be so, there must be two distinct powers existing, at the same time, in each

*United States v. Cruikshank, *et al.*, 92 U. S., 542.

government. Otherwise the exercise of the power, by the one, would be subordinate to its exercise by the other, and this would be inconsistent with the fundamental principles of the whole doctrine of concurrent powers.

The powers of the United States, for the purposes of the federal Union, are complete within themselves. Acts done by the federal government, under the legislation of Congress, or under treaties made in its behalf, in pursuance of these powers, are, therefore, "the supreme law of the land," and under the first clause of the first paragraph of the sixth Article of the Constitution, it is impossible to suppose a condition of subordination, in respect of the exercise of any of its powers, by the United States. Upon the other hand, it is no less true that, as to those powers which were not delegated to the federal government, for federal purposes, the authority of the States is equally supreme. And, as to these, any argument, based upon the idea of subordination, degrades the States, by making their legislation subject to the will of Congress, or, it may be added, to that of either of the other two departments of the federal government.*

*"A concurrent power," says Mr. Justice McLean, in the Passenger Cases, "in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impossible in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of the one, unless there be an arrangement, must necessarily precede the action of the other: and that which is first, being competent, must establish the rule. If the power be equal, as must be the case, both being sovereign, one may do what the other does, and this must be the result of their action. But," the learned Justice continues, "the argument is, that a State acting in a subordinate capacity wholly inconsistent in its sovereignty, may regulate foreign commerce until Congress shall

This cannot be, because Congress can, in no respect, restrict or enlarge the powers of the States. State powers are, at all times and under all circumstances, exercised independently of the general government, and are never declared void, except when they transcend state power and state jurisdiction; and, on the same principle, the federal authority should be declared null and void, when exercised beyond its clear constitutional limits.

Examining the terms of the Constitution, under which the power to regulate commerce is granted to Congress, again, it will be found, that there is nothing, in the language employed, to indicate, that this power stands upon any different footing from that of the taxing power, the power to provide for the punishment of counterfeiting the securities and current coins of the United States, or from any of those other powers which are said to be concurrent; and, if there were no other reason for holding that the commercial power be not concurrent, the terms in which it is granted would seem to place it beyond all doubt; in the same category as those powers which have just been referred to; and, with this as a test, it would be entirely consistent to place this power among the well established concurrent powers of the state and federal governments.*

act on the same subject; and, that the State must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would impair the sovereignty of the States. But this argument degrades the States, by making their legislation, to the extent stated, subject to the will of Congress." 7 How., 283 (399).

*In the case of Gibbons *vs.* Ogden, Mr. Oakley, of counsel for the defendant, argued that the commercial power of Congress was

But, notwithstanding the fact, that all these powers, conceded to be concurrent, are conferred upon Congress, in the same general terms, and by the same section of the same article of the Constitution, as the power to regulate commerce, nevertheless, it has been said that a concurrent power to regulate commerce is an anomaly not found in the Constitution;* and this is declared to be so, because, it is said, the exercise of a concurrent and equal power of commercial regulation, in the state and federal governments, would result in a direct conflict of powers, existing in the two governments, repugnant to each other, continually thwarting and defeating its exercise by either, and such a result would be nothing but disorder and confusion.† The purposes of the establishment of the federal government was to obviate this very condition, and,

a concurrent power, and as such he claimed that it was fully possessed by the States after the declaration of independence, and had since been constantly exercised by them; that it is one of the attributes of sovereignty specially designated in that instrument "to establish commerce"; that it was not granted in express terms to Congress, and that it was not prohibited generally to the States; that the only express restraints upon the power of the States, in this respect, are against levying any import or export duties (except for the execution of their own inspection laws), or of tonnage; against making any arrangement or compact with a foreign power; and against entering into any treaty, and, the learned counsel further added that "all these prohibitions being partial, are founded on the supposition that the whole power resided in the States. They are accordingly all in restraint of State power"; and continuing he said, that "it is a clear principle of interpretation, that where a general power is given, but not in exclusive terms, and the States are restrained in express terms from exercising that power in particular cases, that in all other cases the power remains in the State as a concurrent power. 9 Wheat., 1 (60).

*Passenger Cases, 7 How., 283 (396), *per* McLean, J.

†Id., p. 467, *per* Taney, C. J.

it may be concluded, that the commercial power is not a concurrent power, since, to hold it to be so, would be to deny to the federal government the power to answer one of the most important ends for which it was established.

There can be no question, therefore, but that, the power of Congress over commerce and its regulation, in so far as that power has been delegated to it, by the States, like all other powers vested in the federal government, is complete, and may be exercised to its utmost extent, and acknowledges no limitation, other than those, which have been prescribed by the Constitution itself. And if, as has always been understood, the sovereignty of the United States, though limited to specific objects, is plenary, as to those objects, its power over commerce with foreign nations, among the several States and with the Indian tribes, is as absolute, to repeat what has already been said, as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*

Hence, if the commercial power of the federal government be vested, for any purpose, exclusively in Congress, or, for any reason, the power of that government be paramount to that of the States, it must be conceded, that the power to regulate commerce is not a concurrent power; and that, if, it be shown, that the States have any power to act upon the subject of commerce at all, it must be so, for other reasons, than those which support the application of the doctrine of concurrent powers.

*Gibbons v. Ogden, 9 Wheat., 1 (196).

And, such power, as the States may have, over the subject of commerce, arises from their inherent sovereignty, and not from any delegation of power, by the federal government; for, it is a fundamental principle, that the power to make laws cannot be delegated* by the authority in which it is constitutionally vested; and it has been laid down as a doctrine, to which there should be no exception, that Congress cannot delegate powers to a State, nor sanction a state law in violation of the Constitution, and, if it may adopt a state law as its own, it must necessarily be one which it would be competent for it to enact itself.

D.

The use of the term "temporary," as applied to the power of the several States to establish local rules for the regulation of trade, affecting directly those subjects which fall within the scope of the general commercial power of the legislative department of the federal government, "until Congress sees fit to act," is, perhaps, to some extent, misleading. For, the use of the term "temporary," in this connection, does not necessarily imply, that in the exercise of such a power, the States derive their authority from the action, or from the failure to act, on the part of the federal government; nor that Congress has, in any sense, delegated its constitutional power to regulate commerce to the States. This cannot be, because it is contrary to the very nature of the constitutional powers of the federal government, and the appli-

*Stoutenburg v. Hennik, 129 U. S., 141 (147).

cation of such a doctrine would disturb the fundamental principles which determine the relation of that government to the several States. Nevertheless, the existence of such a power in the States and the application of the principles underlying its exercise, by them, has been often and repeatedly recognized by competent authority.*

But, whatever may be the nature of this temporary power, in the States, it has been found difficult to define the extent of its operation with any degree of certainty. While *Mr. Justice Field* has stated, that "the government created by the Constitution was not designed for the regulation of matters purely local in their character," without regard to any action on the part of Congress,† the general rule, as applicable to this power, has been repeatedly laid down by the Supereme Court of the United States, to be that, when the subjects of the commercial power are local in their operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action, by such legislation as that body may deem appropriate to the subject.‡

And, among the subjects falling within the legitimate

*Cooley v. Board of Wardens, 12 How., 299; Gilman v. Philadelphia, 3 Wall., 713; Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Crandall v. Nevada, 6 Wall., 35.

†Powell v. Pennsylvania, 127 U. S., 678 (690).

‡Pound v. Turck, 95 U. S., 459; Cardwell v. American River Bridge Co., 113 id., 205; Cooley v. Port Wardens, 12 How., 299; Leisy v. Hardin, 135 U. S., 100; Louisiana v. Texas, 176 U. S. 1; Compagnie Francaise de Navigation á Vapeur v. Board of Health, 186 U. S., 380 (399-90).

operation of this temporary power of the States, is held to be the licensing of pilots and the regulation of pilotage by the several States.

A pilot is defined to be a person who is skilled in the steerage of vessels, upon the high seas, and the guidance of them into ports and havens, where they go for the various purposes of trade and transportation. The term is, therefore, equally applicable to two classes of persons—those whose employment is to guide vessels into and out of ports, and those who may be intrusted with the management of the helm and the direction of the vessel on her voyage. To the first of these two classes it is, therefore, plain that, for the proper performance of their duties, a thorough knowledge of the port, in and about which they are employed, is essential, with its channels, currents and tides, its bars and shoals, and the various fluctuations and changes to which it is subject from time to time. To the second class, knowledge of an entirely different character is necessary.*

The authority of Congress to regulate the general subject of pilots and pilotage, under its commercial power, is well settled. It was fully recognized and enforced, in the legislation of that body, at its first session, under the Constitution, when it enacted, by the fourth section of the Act of 1789, "that all pilots, in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively, or with such laws as the States may respectively hereafter enact for that purpose, until

*Pacific Mail Steamship Co. v. Joliffe 2 Wall., 450.

further legislative provision shall be made by Congress."* And, in this condition the matter remained, for forty odd years, when, on March 2d, 1837, Congress enacted another statute on the subject of pilots. This statute, however, provided only that a vessel approaching or leaving a port situate on waters, which are the boundary between two States, may employ a pilot, licensed by either of such States, any law, usage or custom to the contrary notwithstanding.†

So, in 1852, Congress passed another Act, which provided for the regulation of the appointment of pilots upon certain classes of steamboats;‡ and this act was afterwards supplemented by the Act of June 23d, 1864, which required pilots, for the class of vessels named in the Act of 1852, to be licensed according to the provisions of that Act, and prescribing the fees to be paid, by such pilots, for their certificates of license.§

The Act of Congress of July 13th, 1866, on the same subject, provided that no regulation shall be adopted, by any State, making a discrimination as to the rules of half-pilotage, between certain kinds of vessels, mentioned in the Act, and declared, that existing regulations of the States, which make such discrimination, shall, by this Act, be annulled.¶ Although relating to other matters, the Act of Congress of February 25th, 1867, contains a pilot regulation, touching sea-going vessels, with a *pro-*

*1 U. S. Stat., 54.
†5 U. S. Stat., 153.
‡10 U. S. Stat., 63.
§13 U. S. Stat., 120.
¶14 U. S. Stat., 93.

viso that certain state regulations should not be affected by the Act.*

Notwithstanding the provisions of the Act of 1789, recognizing and asserting the power of Congress to regulate pilots, under the commercial clause of the Constitution, the question was early raised as to whether the power of Congress, as to the regulation of pilots, was exclusive, in the federal government, or whether it could be exercised by the States, in any event; and *Mr. Webster*, arguing for the most extensive power, in the general government, concerning commercial regulation, contended that pilot laws were not commercial regulations, and, on that account, were not within the power of Congress.† The determination of the question, thus presented, was not, however, necessary to the settlement of the constitutionality of the law, in connection with which the contention was made, and was, therefore, not determined by the decision of the court.

The same question was, however, again presented to the Supreme Court of the United States, in the case of *Cooley* against the *Board of Wardens of the Port of Philadelphia, et al.*, which arose upon the validity of a regulation of pilotage, under the authority of an Act of the Legislature of the State of Pennsylvania, and, upon consideration of the facts, presented by the record in that case, the court determined that a regulation of pilots is a regulation of commerce, within the grant of the commercial power to the federal government, and that the

*14 U S. Stat., 412.
†Gibbons v. Ogden, 9 Wheat., 1 (18).

subject is, therefore, within the regulating power of Congress. In support of this doctrine, it was said by the learned justice, who delivered the opinion of the court, that the power of Congress over pilots stands upon the same footing as that over the officers and seamen, who assist him in managing the vessel; and, in a subsequent case, it was held, that a pilot is as much a part of the commercial marine, as the hull of the ship, and the helm by which it is guided, although it was there admitted, that it by no means follows that the subject of pilotage may not be regulated by the States, at least, until Congress sees fit to act upon the subject.*

In view of these conclusions, it may be well to note, that much has been said of the effect of the Pilot Act of 1789. Some authorities have maintained, that the adoption of the State laws, in existence at the time of its passage, as well as those which should thereafter be enacted by the States, was a declaration on the part of Congress, that the commercial power was not delegated exclusively to the general government—thus contending for the application of the doctrine of concurrent powers in its relation to the commercial power, or, at least, of a temporary power, in the States, over the subject—while others have urged, that the adoption of these laws had no such effect, but, that it only amounted to a re-enactment of the laws of the several States, and, when so re-enacted, they became the laws of the United States.

The latter view was taken by *Mr. Justice McLean*, who

Ex parte McNiel, 13 Wall., 236.

stated it, as his opinion, in the *Passenger Cases,** that, by adoption, the State laws, referred to in the Act of Congress, are the laws of the United States itself, and, as such, effect is given to them. In support of this opinion, he argued that the laws of the States, which regulate the practice of their courts, are adopted by Congress to regulate the practice of the federal courts. And, those laws, he observes, so far as they are adopted, are as much the laws of the United States, as if they had been specifically enacted by Congress. The repeal of them by the States, unless future changes in the Acts be also adopted, does not affect their force in regard to federal action. And, the same learned justice, elsewhere referring to this Act of Congress, also said, "Congress adopted the pilots laws of the States, because it was well understood they could have no force as regulations of foreign commerce, or commerce among the States, if not so adopted."†

While it is true, as a general proposition, that the

*7 How., 283.

†Cooley v. Board of Wardens, 12 How., 299. In the case of Morgan Steamship Co. *vs.* Louisiana Board of Health (118 U. S., 455), in considering the effect of the Quarantine Act of April 29, 1878 (20 U. S. Stat., 37), as amended by the Act of 1893 (27 U. S. Stat., 449), the Supreme Court of the United States have adopted a different view from that which is here expressed, by Mr. Justice McLean, since it declared that those acts "did not impair the power of the States to pass quarantine laws, since it expressly provided that 'there shall be no interference in any manner with the quarantine laws or regulations as they now exist or may hereafter be adopted, under State laws,' showing the intention of Congress to adopt those laws, or to recognize the power of the States to pass them." See also Louisiana v. Texas, 176 U. S., 1 (21); Compagnie Francaise de Navigation á Vapeur v. Board of Health, 186 U. S., 380 (388-9).

United States, through its legislative department, may adopt the laws of one or more of the several States, as its own, the acceptance of the doctrine, as thus broadly stated by *Mr. Justice McLean,* has not been uniform; and this is not at all surprising, since it is logically impossible for Congress to adopt any law of the States, not yet enacted, and, as has been said, it is difficult to see how that body may, by a provision relating to future legislation, confer upon the States power to enact laws, upon any subject, much less upon a subject which is claimed to, and actually does, in some of its aspects, fall within the exclusive power of Congress.* Congress may, undoubtedly, adopt state legislation, when the subject of the legislation in question falls within the constitutional limits of the powers of the federal government, yet it is impossible for that body, by general legislation, such as that of the Pilot Act of 1789, to perpetually confer upon the States powers not left to them, after the adoption of the Constitution, or to enable the States to legislate on subjects clearly within the power of Congress. If the States were divested, by the Constitution, of the power to legislate on the subject of pilots and pilotage, evidently the Act of 1789 could not undo that, which the Constitution had done, and confer this power on the States anew.

As has been shown already, the States do, and have always legislated on the subject of commerce, both in respect of foreign and inter-state commerce; and this is said to imply a constitutional power to do so. Because

*Passenger Cases, 5 How., 283 (580), *per.* Taney, C. J.

only a rule established by a sovereign power, acting in its legislative capacity, can be deemed to be a law, enacted by a State; and, if a State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws upon that subject.*

So, in the same line of argument, it is said, that whatever may have been the effect of the provisions of the Act of 1789, looking to future state legislation, it is clear, that the body which passed that Act did not doubt the power of the States to legislate upon the subject with which it deals; and it has also been mentioned as a fact of importance, bearing upon the whole subject, that the body which enacted this statute was the first Congress which sat, under the Constitution, and that many of its members were delegates to the convention which framed that instrument and recommended its adoption,† to the people of the several States.

Concerning the Act of Congress of 1852, it was contended, in a case which came to the Supreme Court of the United States from the State of California, that, having assumed to regulate pilotage, in a certain manner, the Act of Congress repealed the Act of 1789, and superseded all state legislation concerning port pilotage, in so far as steamers carrying passengers are concerned, at any rate; and, to that extent, modified and repealed the Act of the Legislature of that State, of 1861, the constitutionality of which was in issue. Upon this point,

*Cooley v. Board of Wardens, 12 How., 299.
†*Ex parte* McNiel, 13 Wall., 236.

however, the court was of a different opinion. "We do not perceive," it says, referring to the Act of 1852, "in its provisions, any intention to supersede state legislation recognized by the Act of 1789, or any inconsistency with the local port regulations, established by the act of California of 1861. The Act of 1852 was intended, as its title indicates, to provide greater security than then existed, for the lives of passengers on board of vessels propelled, in whole or part, by steam. Previous to its passage, frequent accidents, occasioning, in some instances, great loss of life, occurred to steamers, arising from the imperfect construction of the vessel, defective machinery, inadequate protection against fires, the carrying of dangerous articles, or the want of pumps, life boats and other means of escape, in case of danger. To guard against accidents from these, and like sources, was the general purpose of the Act of 1852. . . . . The Act contained few provisions relating to pilots; indeed, it was not directed to the remedy of any evil of the local pilot system. There was no complaint against the port pilots; on the contrary, they were the subject of just praise for their skill, energy and efficiency."*

Prior to 1852, the whole subject of pilots and pilotage was regulated by the several States, subject to the single limitation imposed by the Act of Congress of 1837. Under these conditions, therefore, there was no distinction between the regulation of port and harbor pilots and those engaged in steering vessels upon the high seas. But, in the Act of 1852, a distinction was made in respect of

*Pacific Mail Steamship Co. v. Joliffe, 2 Wall., 450.

certain sea-going vessels; and it may, perhaps, be correctly said, that inasmuch as Congress has seen fit to regulate this class of pilots, the exercise of the power, by the States, is superseded by the assertion and exercise of the paramount authority of Congress, in this respect.* However, since this applies only to the class of pilots mentioned in that Act, the general regulation of port pilots has remained with the States, subject to such restrictions as Congress may already, by express enactments, have placed upon its exercise by the States.†

Accordingly, it may be concluded that, although the general subject of pilots and pilotage has an intimate connection with, and bears an important relation to commerce with foreign nations and among the several States, over which it was one of the main objects of the Constitution to create a national control, nevertheless, the mere grant of the commercial power to Congress does not forbid the passing of laws to regulate the subject, by the States; and it has been uniformly held that, until Congress shall actually assume control, the States may regulate the subject, in any manner, not inconsistent with such legislation, as that body may have already enacted, and with the ultimate authority of the general government to assume control, whenever its legislative department shall see fit and proper to assume that authority.‡

*Pacific Mail Steamship Co. v. Joliffe, 2 Wall., 450.

†As to the present *status* of State regultion of pilots, see Homer Ramsdell Transportation Co. v. Compagnie Général Transatlantique, 182 U. S., 406.

‡Cooley v. Board of Wardens, 12 How., 299; Pacific Mail Steamship Co. v. Joliffe, 2 Wall., 450.

But, however extensive the power of the federal government to regulate pilot and pilotages may be, it is said that experience has shown that skill and efficiency, on the part of the local pilots, is best secured by leaving the subject primarily to the control of the States.

The regulation of buoys and beacons has likewise been held to fall within the scope of the temporary power of the States.

These are, undoubtedly, important aids to commerce, and are sometimes absolutely essential to the safe navigation of vessels for the purpose of indicating the channels to be followed at the entrance of harbors and in rivers, and, therefore, their establishment, by Congress, is clearly within the commercial power of the federal government. But it has been said, that it would be extending that power to the exclusion of state authority, to an unreasonable extent, to hold, that, while it remains unexercised by Congress, it would be unlawful for the States to provide buoys and beacons, required for the safe navigation of its harbors and rivers, and, in case of their destruction, by storm or otherwise, to temporarily supply their places, until Congress could act, and provide for their re-establishment.*

So, in like manner, the establishment and regulation of lighthouses have been generally left to Congress; but there is no reason to suppose, that the power of Congress over these establishments is necessarily exclusive.

Like the Act of Congress of 1789, in relation to pilots and pilotage, the early laws of the United States fully

*County of Mobile v. Kimball, 102 U. S., 691.

recognize the right of the States to maintain lighthouses within their several jurisdictions. Thus, the Act of Congress, passed, under date of August 7th, 1789, for the establishment and support of lighthouses, buoys and beacons, directs that their expense, after a certain date mentioned in the Act, should be defrayed out of the Treasury of the United States, *provided*, that this expense should not continue over one year, unless the edifices referred to in the Act, should, in the meantime, be ceded to and vested in the United States, by the State in which it may be, with all jurisdiction over them as well as of the lands upon which they stood.

As a matter of fact, however, the States were slow in making these cessions, and by the Act of 1790, the time was extended to 1791, and so on, from time to time, for five or six years, until all the States finally accepted the provisions of these Acts; but during all this time lighthouses, in several of the States, were kept up, by state authority, without any interference or control, on the part of Congress.

But, since these Acts contemplated the cession not only of the edifices, but also the lands upon which they were built, to the United States, and since the effect of the acceptance of their provisions, by the several States, in which they were situated, was to transfer these lands to the general government, it is apparent that the United States thereupon became seized of these lands and edifices, and that their whole management, control and regulation was vested in that government, under its power "to . . . . make all needful rules and regulations

respecting the territory and other property belonging to the United States," irrespective of the extent of its constitutional power to regulate commerce; and, the United States has, with respect to its own lands and property, within the limits of a State, all the rights of an ordinary proprietor,* and the courts of a State can in nowise interfere with the control of such property, owned and operated by that government.†

And, so of wharfs, warehouses and elevators, whose regulation, by the States, in which they are situated, is justified, on the ground, that they are, in their nature local, and, as such, require a diversity of rules and regulations, which may be prescribed, by the States, in the absence of congressional legislation. The doctrine, applicable to this branch of the subject, is forcibly laid down, by *Mr. Chief Justice Waite,* in the leading case of *Munn* against the *State of Illinois,*‡ when he said, that "certain until Congress acts in reference to their inter-state relation, the State may exercise all the powers of government over them, even though, in so doing, it may operate upon commerce outside its immediate jurisdiction."

Hence, it is, that the principle, underlying the doctrine of the temporary power of the States to establish commercial regulations of a local character, in respect of

*Benson v. United States, 146 U. S., 325; Camfield v. United States, 167 U. S., 518.

†Green Bay Canal Co. v. Patten Paper Co., 173 U. S., 179.

‡94 U. S., 113; see also, Chicago, Burlington & Quincy Railroad Co. v. Iowa, id., 155; Peik v. Chicago & Northwestern Railroad Co., id., 164; Stone v. Farmers' Loan & Trust Co., 116, id., 307; Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 id., 557; Hall v. De Cuir, 95 id., 485.

those subjects falling within the commercial power of Congress, arises not only from the designs of the framers of the Constitution, but also from the nature of the subjects upon which the power is intended to operate.

There can be no doubt, but that, one of these designs was to entrust the care of local interests to the regulating power of local authorities, and, consequently, that the purpose of that instrument was to vest in the federal government, only such powers of a general nature as were found to be necessary to conserve the public interests of that government, and to promote the general welfare of the whole country; and, it is apparent, that, while the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects and while some of these demand a single uniform rule, operating equally on the commerce of the United States, in every part of the country, there are others which require that diversity of regulation, that can alone meet the local necessities of the case. And, the superior fitness and propriety, not to say the absolute necessity of different systems of regulation, is uniformly recognized, in those cases, where a general rule is not required, of local subjects, drawn from local knowledge and experience, and made to conform to local wants and requirements.*

Therefore, in its operation, upon these local subjects, the power of the States is without limit, and it may be exercised to any extent, not inconsistent with the laws of

*Parkersburg & Ohio River Transportation Co. v. City of Parkersburg, 107 U. S., 691; Cooley v. Board of Wardens, 12 How., 299 (319).

Congress. Were this not so, the result would be, that those subjects of a purely local and temporary nature, in the absence of congressional action, would be without any regulation whatsoever, and a lawless condition of things would exist, within the heart of the community, and, on a matter vital to the interest of all the States.* For this reason, therefore, the temporary power of the States, in the matter of commercial regulations of a purely local nature, is held to be not incompatible with the commercial power in the general government.

In all those cases of a local nature, falling within the purview of the temporary power of the States, the State authority, is said to be plenary, and is subject to no limitation, until the dormant power of Congress is awakened and made effective, by appropriate legislation, and, the exercise of this power, by the States, in good faith, cannot be made the subject of review by the courts of the United States.† Indeed, these courts have no authority to ignore State laws and regulations of this class, or to declare them invalid, by reason of any supposed repugnance to the Constitution and laws of the United States. This is so, because the commercial power is essentially legislative, and because, it is to Congress, that the power has been granted, and, the courts can never take the ini-

*Passenger Cases, 7 How., 283 (562) *per* Woodbury, J.; County of Mobile v. Kimball, 102 U. S. 691.

†Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How., 578; Gilman v. Philadelphia, 3 Wall., 713; Miller v. Mayer, *etc.*, of New York, 109 U. S., 385; Cardwell v. American River Bridge Co., 113 id., 205.

tiative. Congress must, therefore, first legislate and establish the federal rule, before the courts of the United States can proceed upon any ground of paramount jurisdiction;* for, as was said by *Mr. Justice Harlan*, in the case of the *Inter-state Commerce Commission* against *Brimson*†:—"The test of the power of Congress is not the judgment of the courts, that particular means are the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means adopted in the execution of a power granted are forbidden by the Constitution."

From its very nature, therefore, the local and temporary power of the State, extends both to foreign and inter-state commerce, since, there is much, even in connection with foreign commerce, which is local to the several States, convenient for their regulation, and useful to the public, to be acted upon by each State, as occasion requires, until the power is abused or some course is taken by Congress, conflicting with such State regulation.‡

This power of the States being, essentially, temporary in its nature and operation, and being based alone upon their inherent power to legislate upon all subjects of a local character; and, the power of Congress to supersede the exercise of this power, on the part of the States, being general and paramount, it necessarily follows, that

*Parkersburg & Ohio River Transportation Co., v. City of Parkersburg, 107 U. S., 691; Wabash, St. Louis & Pacific Railroad Co., v. Illinois, 118 id., 557; Northern Securities Co., v. United States, 193 U. S., 197 (352).

†154 U. S., 447 (473); see also, Sinking Fund Cases, 99 U.S., 700 (718).

‡License Cases, 5 How., 504 (624), *per* Woodbury, J.

the exercise of this power, by the States, may be terminated, at any time, by Congress assuming control and acting upon the subject itself;* and, it also follows, that, when Congress does assume control, by appropriate legislation, the power of the States ceases to be operative, and the congressional rule must prevail; and, having the power to act upon the subject, in any event, an Act of Congress, or a treaty made, in pursuance of the Constitution is supreme, and the laws of the States, although enacted in the exercise of powers not controverted, must, in such case, yield to the paramount authority of the federal government.†

The power of the States, in such cases, has, therefore, been said, to be sustained only by reason of the absence of congressional legislation,‡ and, where the subject of its exercise has been covered by such legislation, the law of the State must give way;§ and all local state legislation covering the same ground will cease to have any force, whether formally abrogated or not.¶

But, unlike those powers of a general nature, falling within the scope of the exclusive powers of Congress, affecting all the States, in their relation to each other and

*The Lattawana, 21 Wall., 558; Cardwell v. American River Bridge Co., 113 U. S., 205.

†Gibbons v. Ogden, 9 Wheat., 1; Henderson v. Wickham, 92 U. S., 259.

‡Gulf, Colorado & Santa Fé Railway Co. v. Hefly, 158 U. S., 98 (104).

§Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railway Co., 167 U. S., 633 (642); Green Bay & Mississippi Canal Co., v. Patten Paper Co., 173 U. S., 179; Wisconsin v. Duluth, 96 U. S., 379 (387).

¶Reid v. Colorado, 187 U. S., 137 (147).

with foreign nations, requiring uniformity of regulation, the non-action of Congress, upon these subjects of a local nature, is not to be taken as a declaration, that nothing shall be done in respect of them, by the States; but, is rather to be deemed to be a declaration, that, for the time being, and until Congress shall see fit to act, they may be regulated, by State authority.*

In considering the subject of the concurrent powers of the State and federal governments, it was said, that, as to those powers not delegated to the United States, for federal purposes, the authority of the several States, within the scope of their reserved powers, is supreme, and in the exercise of these powers, it acts coördinately with the government of the United States; and that, the power, when the occasion for its suspension seems to require, may be resumed, at any time, when the paramount authority of the United States over the subject-matter of the power, is, for any reason, withdrawn.†

To summarize what has already been said of the nature of the commercial power of Congress, it needs only to be added, that, upon subjects of a general nature, the controling and supreme power to regulate commerce with foreign nations, among the several States and with the Indian tribes, is vested in the legislative departments of the federal government, although the mere grant of the power does not necessarily make it exclusive;‡ that, in the grant of the commercial power to Congress, the lan-

*County of Mobile v. Kimball, 102 U. S., 691; Escanaba & Lake Michigan Transportation Co. v. Chicago, 107 id., 678.

†See Reid v. Colorado 187 U. S., 137.

‡License Cases, 5 How., 504 (579), *per* Taney, C J.

guage of the Constitution does not, in terms, exclude the States from the exercise of some authority over the subject-matter;* that, while there are some subjects embraced within the commercial power of Congress, which require a general or uniform rule, applicable alike to the whole country, the nature of the power itself does not render it exclusive in the federal government† for all purposes, and, that some of the subjects of the commercial power are temporary and local in their nature, and may be regulated by the States, until Congress shall, in the exercise of its paramount power, cover the same ground, by such legislation as it may deem appropriate to enact‡ upon the subject.

To these limitations of the power of Congress to regulate commerce, growing out of the nature of the subject-matter of the power, it has also been held, that, whatever may be its extent, it cannot be exercised, by the federal government, so as to create a monopoly, nor can it be invoked to impair the obligations of private contracts. Thus, in the case of *Pennsylvania* against *Wheeling & Belmont Bridge Company,*§ it was said, by *Mr. Justice Daniel,* in a dissenting opinion, that, "The power to regulate commerce was given to the federal government, whose functions were designed to be general and co-extensive with the entire confederacy, because, its duties embrace

*Cooley v. Board of Wardens, 12 How., 299; Pacific Mail Steamship Co. v. Joliffe, 2 Wall., 450.

†License Cases, 5 How., 504 (608), *per* Carton, J.

‡Cooley v. Port Wardens (*supra*), Gilman v. Philadelphia, 3 Wall., 713; Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Crandall v. Nevada, 6 Wall., 35; Pound v. Turck, 95 U. S. 459.

§13 How., 518.

the equal rights and interests of all the members of the confederacy, and of the means of the widest diffusion of commercial facilities and intercourse, within the powers vested by the Constitution. It, therefore, cannot be rationally concluded, that a provision, palpably intended to protect commerce from unequal and invidious restrictions, the power was given to advance, so far towards restriction or monopoly, as to limit commerce to particular channels; thereby crippling or wholly preventing its diffusion and activity, and, by the same process, conferring upon particular points or sections of the country, arbitrary and unjust advantages, and visiting upon those portions affected by such procedure, loss and even ruin."

The statement of this plain limitation upon the commercial power of Congress, would seem to justify the conclusion, that that body has no authority to destroy the navigation of one State to improve the navigation of another; yet Congress has always taken a different view of the subject, and, in upholding the action of the legislative department, the Supreme Court of the United States has held, that the matter is wholly within the discretion of Congress; and, an appropriation for the improvement of a harbor or a navigable stream, to be expended, under the direction of the Secretary of War, confers upon that officer, the discretion to determine the mode of improvement, and authorizes the diversion of the waters from one channel into another, if, in his judgment, such is the best mode; and, that such diversion is not giving the ports of one State preference over those of another.*

*South Carolina v. Georgia, 93 U. S., 4.

But, it has been held, that Acts of Congress, for the improvement of the navigation of a river, are not sufficient to establish the police power of the United States over the navigable streams to which they relate.*

While the doctrine laid down, by *Mr. Justice Daniel,* in the *Wheeling & Belmont Bridge case,* above referred to, contains a clear limitation upon the authority of Congress, so far as the establishment of monopoly, by the exercise of its power to regulate commerce, is concerned, the question of its authority to suppress monopolies first came to the Supreme Court of the United States, for determination, after the Anti-Trust legislation of Congress of 1890, in the case of the *United States* against the *E. C. Knight Company.*† In that case, the Court admitted, that "the relief of the citizens of each State from the burdens of monopoly and the evils resulting from the restraint of trade, among such citizens was left [by the Constitution] with the States to deal with, and that this court has recognized their possession of that power, even to the extent of holding, that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community,—it is subject to regulation by state legislative power;" and while this rule was applied, in that case, nevertheless, the doctrine

*Willamette Iron Bridge Co., v. Hatch, 123 U. S., 1 (13).
†156 U S., 1 (11, 12).

was laid down, that, since the power to regulate commerce is the power to prescribe the rules by which it shall be governed, and, is a power independent of the power to suppress monopoly, it may operate in reference to monopoly whenever it comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce; and, in the case of the *Addyston Pipe & Steel Company* against the *United States,** referring to the facts found by the court below, and upon which that case came up, for final determination, it was held, that the appellant's contention, to the effect that, even if the contract or combination complained of did, in fact, affect inter-state commerce, it was only a reasonable restraint upon a ruinous competition, among themselves, and was formed only for the purpose of protecting the parties thereto, thus enabling them to obtain prices for their products which were fair and reasonable, was unworthy of consideration; that the commercial power of Congress, extends to all monopolies, in restraint of inter-state trade, and, that, since the effect of the combination in question was to enhance prices beyond a sum which was reasonable, it was in violation of the Anti-Trust Act of Congress, and, therefore, void.

So, in the *Northern Securities case,*† this principle was extended, by the holding, that, in order to vitiate such a combination, as the Anti-Trust Act condemns, it need not be shown, that it, in fact, amounts to, or will result in a total suppression of trade, or in a complete

*175 U. S., 211 (235).
†193 U. S., 197 (332).

monopoly, but it is only essential to show, that, by its necessary operation, it tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.

As to the application of the commercial power of Congress to private contracts, the same court has held, that, although this power was vested in the federal government, in order to insure equality and freedom in commercial intercourse, against discriminating state legislation, it was never intended, that the power should be exercised by Congress, so as to interfere with the freedom of private contracts, not designed, at the time they were made, to create impediments to such intercourse. This principle was announced in the case of the *Dubuque & Sioux City Railroad Company, et al.,* against *Richmond, et al.,** in which the appellant urged, that the contract, involved in that action, was repugnant to the commercial power of Congress, as exercised, in the passage of the Acts of Congress of June 15th, 1866, and of July 25th, 1866, and was, therefore, void. But, in its determination of the case, the court held, that these Acts were intended to reach trammels interposed by state enactment or by existing laws of Congress, and, that they were not intended, even if it were competent for Congress to authorize such proceedings, to invade the domain of private contracts, and annul all such contracts, as had been made on the basis of existing legislation and existing means of interstate communication; and, the learned justice, who delivered the opinion of the court, in that case, declared, not

*86 U. S. 584.

only, that the argument of the plaintiff in error was erroneous, but also, that its application would lead to the abrogation of all contracts, which might prove, from subsequent events, to be more onerous, than contracts made after such events had happened. As an instance of this, he cited a contract for the supply of coal, made upon terms, which were, at the time, reasonable, but, which might be felt to be very hard and oppressive, if, before its termination, the discovery of new fields of coal, in the vicinity, should reduce the market-price of the article one-half; and, in conclusion, he said, that to assent to the proposition, that the enforcement of a contract of this kind, would be repugnant to the commercial power of Congress, because, the expense of transportation would be less, if the contract were annulled, would not be more extraordinary, than the position assumed by the appellant, in the case at bar, and would be equally entitled to consideration. Therefore, "when counsel speaks," he adds, "of public policy established by the Acts of Congress mentioned, he must mean nothing more than, that the Acts were intended to facilitate commercial intercourse among the States. Undoubtedly, such was the case, and it is of great public interest, that such intercourse should be free and untrammelled. But, if comparison may be made with respect to a subject of this nature, we should say, that the observance of good faith between parties, and the upholding of private contracts and the enforcement of their obligation, are matters of higher moment and importance to the public welfare and far more reaching in their consequences."

So, in another case,* it was held, that if power to regulate commerce applied to all the incidents to which commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity, and would exclude state control over many contracts purely domestic in their nature; and, on another occasion,† it was also said, that the "slightest reflection will show, that, if the national power extends to all contracts and combinations in manufacture, agriculture, mining and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control."‡

Relying upon the doctrine, laid down in these and similar cases, it was argued, by counsel for the appellant, in the case of the *Addyston Pipe & Steel Company* against the *United States*,§ that, the power of Congress to regulate commerce does not include the general power to interfere with, or prohibit, private contracts between citizens, even though such contracts have inter-state commerce as their object, and result in a direct and substantial obstruction to, or regulation of such trade; but, the court held otherwise, and laid down the rule, that, under this grant of power to Congress, that body may enact such legislation as shall declare void and

*Hooper v. California, 155 U. S. 648 (655), *per* Mr. Justice White.

†United States v. E. C. Knight Co., 156 U. S. 1 (16).

‡Kidd v. Pearson, 128 U. S. 1 (23).

§175 U. S., 211 (228-30).

prohibit the performance of any contract between individuals and corporations, where the natural and direct effect of such contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, inter-state (and foreign) commerce; *Mr. Justice Peckham,* who delivered the opinion of the court, saying:—"While unfriendly and discriminating legislation of the several States may have been the chief cause for granting to Congress the power to regulate inter-state commerce, yet we fail to find, in the language of the grant, any such limitation of that power as would exclude Congress from legislating on the subject, and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate inter-state commerce," and, quoting from the *Debs case,* the learned justice pertinently asks, "If a State, with its recognized power of sovereignty, is impotent to obstruct inter-state commerce, can it be, that any mere voluntary association of individuals, within the limits of a State has a power which the State does not itself possess?" To this question, the decision of the court in the case, at bar, was a sufficient answer, although the same conclusion had already been reached, in the case referred to,* and in the *Trans-Missouri Freight Association case,*† where it was expressly held, that the principle, that the States may not enact any law in restraint of those subjects which are vested in Congress, applies

**In re* Debs, 158 U. S., 564.

†United States v. Trans-Missouri Freight Association, 166 U. S. 290 (341).

equally to individuals and to corporations engaged in inter-state commerce, and falls under the regulating power of Congress, as exercised in the passage of the Act of July 2d, 1890, known as the Anti-Trust Law.*

In pursuance of this doctrine, it has, likewise, been held, that an agreement between manufacturers and dealers belonging to an association, in which its members agree not to purchase from manufacturers, not members of the association, and to sell to no one, not a member, for less than the list price, is a combination in restraint of trade, and when the subject of such an agreement, concerns inter-state commerce, it falls within the prohibitions of the Anti-Trust Law;† and so, where a corporation, controlled by a railroad company, purchases coal, at the mines or breakers, under an agreement, fixing the price to the vendor, on the basis of a percentage of the average price received at tide-water, in another State, it being claimed, that the transaction was the means whereby the railroad company gave preferential rates to the selling company, it was held, that the Inter-state Commerce Commission may, in a proceeding properly instituted, inquire into the manner in which the business is done, and compel, through the Circuit Court, the testimony of witnesses, as well as the production of the contracts relating to such agreement,‡ under the provisions of the Act of Congress establishing that Commission.§

*26 U. S. Stat., 209.

†Montague & Co. v. Lowry, 193 U. S., 38.

‡Interstate Commerce Commission v. Baird, 194 U. S., 25.

§Acts of February 4, 1887, March 2, 1889, and February 10, 1891; 24 U. S. Stat., 104; 25 id., 382; 26 id., 128.

However, not all contracts affecting inter-state and foreign commerce, or involving transactions between citizens of the several States, are within the regulating power of Congress, since it has been held, that, the contract of an emigrant agent, engaged in the business of hiring laborers in one State to be employed, beyond the limits of that State, although it may involve questions of international concern between the United States and the foreign nation, from which such emigrants may come into its jurisdiction, and although the "transaction must eventually take place, as the result of such a contract," it does not follow, that such agent is engaged in transportation, or that a state tax on his occupation was levied on transportation, as a means of inter-state commerce;* so, the business of insurance is not commerce; and being a mere incident of commerce, a contract of insurance does not fall within the regulating power of Congress,† even though such contract be between a company of one State and a citizen of another; and, where a foreign corporation has become localized in a State, and accepts the laws of that State, as a condition of doing business there, it cannot abrogate those laws, by attempting to make contract stipulations, in contravention thereof;‡ and the principle is well settled, that, a statute of a State, which does not attempt to substantially regulate or control con-

*Williams v. Fears, 179 U. S., 270.

†New York Life Insurance Co. v. Cravens, 178 U. S., 389, see also, Paul v. Virginia, 8 Wall., 168; Liverpool and London Insurance Co. v. Massachusetts, 10 id., 566.

‡National Building & Loan Association v. Brahan, 193 U. S., 635.

tracts as to inter-state shipment, but simply establishes a rule of evidence, determining the proof, by which a carrier may prove the contract, is not unconstitutional, as being in contravention of the provisions of the commercial clause of the federal Constitution.*

And, in construing the provisions of the Act of Congress establishing the Inter-state Commerce Commission, the Supreme Court of the United States has laid down the doctrine, that although the purpose of that Act was to obviate the insufficiency of the laws of the several States, and to secure the public against unreasonable and unjust discriminations, in the business of transportation, it was not designed "to prevent the customary arrangements, made by railway companies for reduced fares, in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons," traveling over their roads, under like circumstances.†

It has also been held, that, since only such acts as directly interfere with the freedom of inter-state commerce, are prohibited by the Constitution, the Anti-Trust Act, is not applicable to contracts which have only a remote and indirect bearing on commerce between the States and with foreign nations, and, therefore, the requirements of an ordinance of a municipal corporation of one of the States, enacted in pursuance of legislative authority, that a particular kind of asphalt, produced only in a

*Richmond & Alleghany Railroad Co. v. Patterson Tobacco Co., 169 U. S., 311 (313).

†Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 145 U. S., 263.

foreign country, shall be used in paving its streets, does not violate the federal right of commercial regulation, and is not inhibited by the provisions of the Anti-Trust Act;* that, that Act does not declare illegal, sales made by a combination mentioned therein, or by its agents, of property acquired, or which came into its possession, for the purpose of being sold, such property being, at the time, in course of transportation from one State to another, or to foreign countries,† and that, under the Act, if merchandise be in transit, by one connecting line of inter-state communication, such connecting line is not required to deliver the merchandise to another line, without a contract for that purpose, and the courts are without authority to dictate the terms of such a contract, or to require one to be made.‡

However, in the case of the *Northern Securities Company* against the *United States*,§ it was determined, that the Anti-Trust Act is not limited to restraints of inter-state and foreign trade which are unreasonable in their nature, but embraces all restraints, imposed by combination, conspiracy or monopoly upon such trade, and, that combinations, even among private manufacturers and dealers, whereby inter-state or foreign commerce is restricted, are equally embraced within the provisions of the Act.

*Field v. Barbour Asphalt Co., 194 U. S., 618.

†Connolly v. Union Sewer Pipe Co., 184 U. S., 540.

‡Central Stock Yards Co. v. Louisville & Nashville Railroad Co., 192 U. S., 568; Atchison, Topeka & Santa Fé Railway Co. v. Denver & New Orleans Railway Co., 110 U. S., 667.

§193 U. S., 197.

Although the definition of the term commerce, and the scope of the power of Congress over its regulation, have been sometimes extended, so as to include the manufacture, as well as the sale, and ultimate disposition of manufactured articles, the mere fact, that such articles are manufactured, in one State, for export to another, does not, of itself, constitute them articles of interstate commerce, within the purview of the Constitution. Hence, it has been held, that the intent of the manufacturer does not determine the time when such articles pass from the control of the States, and become articles of commerce,* subject to regulating power of Congress; the reason assigned for this, being, that although the power to control a given thing, may involve, in a certain sense, the control of its disposition, this is its secondary, and not its primary object; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it.†

Therefore, until a manufactured article has become the subject of that commerce, the regulation of which is vested in the federal government, it is for the Legislatures of each of the States, and not for Congress, to determine whether its manufacture, or sale, will injuriously affect the public morals, health and safety of its inhabitants;‡ and, for this reason, it was held, that a law of the State of Ohio, relating to the manufacture and sale of oleomar-

*Coe v. Errol, 116 U. S., 517; Kidd v. Pearson, 128 U. S., 1 (24); United States v. E. C. Knight Co., 156 U. S., 1 (13); see also Diamond Glue Co. v. United States Glue Co., 187 U. S., 611.

†United States v. E. C. Knight Co., 156 U. S., 1.

‡Leisy v. Hardin, 135 U. S., 100 (123).

garine, in that State, does not conflict with the commercial power of Congress,* although that body may have enacted a law upon the same subject.†

The whole subject of the relation of the power of the several States, in respect of their control over the manufacture of products, within their respective limits, to the regulating power of Congress, was ably discussed, by *Mr. Justice Lamar,* in the case of *Kidd* against *Pearson,*‡ and, "If it be held," says he, "that the term includes the regulation of all such manufactures as are intended to be subjects of commercial transactions, in future, it is impossible to deny, that it would also include all productive industries that contemplate the same thing. The result would be, that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agricultural, mining—in short, every branch of industry. . . . The power being vested in Congress and denied to the States, it would follow, as an inevitable result, that the duty would devolve on Congress to regulate all those delicate, multiform and

*Capital City Dairy Co. v. Ohio, 183 U. S., 238.

†Act of August 21, 1886, 24 U. S. Stat.. 209. This Act, however, it has been held, was not intended as a regulation of commerce, but only to relieve the manufacturer or seller, from punishment, so far as the general government is concerned. See Plumley v. Massachusetts, 155 U. S., 461 (467), in which it was also held, that "taxes, prescribed by that act, were imposed for national purposes, and, [that] this imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulation which the State might lawfully prescribe in reference to that article" id., (466).

‡128 U. S., 1.

vital interests—interests which, in their nature, are, and must be, local in all the details of their successful management," and the learned justice, therefore, very properly concluded, that the mere manufacture of articles of commerce, did not of itself subject them to the regulating power of Congress.

But, in so far as the legislation of Congress of 1890, applies to manufactures, *Mr. Justice Harlan* says, "that although the Act of Congress, known as the Anti-Trust Act, has no reference to the mere manufacture or production of articles or commodities, within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, or whatever nature, and whoever may be the parties to it, which directly or necessarily operates in *restraint* of trade or commerce *among the several States, or with foreign nations.*"*

Aside from the limitations upon the power of Congress to regulate commerce, indicated and suggested above, it is also subject to the express constitutional provision, that, "no preference shall be given to any regulation of commerce . . . to the ports of one State over those of another;"† and, it goes without saying, that if such preference be given by the legislative action of the federal government, the regulation attempted, in pursuance of such action, would be necessarily void.‡

*Northern Securities Co. v. United States, 193 U. S., 197.

†Const. U. S., Art. I., sec. IX., cl. 6.

‡Pennsylvania v. Wheeling, and Belmont Bridge Co., 13 How., 421, *per* McLean, J.

And, considering the wording of the Constitution itself, it would seem to be unnecessary to add, that the commercial power of Congress does not extend to the regulation of the internal or domestic commerce of the several States; but, inasmuch as this branch of the subject has received the attention of the courts, it may not be inappropriate to state, that the conclusion has always been accepted, that Congress can no more regulate commerce of this character, than a State can regulate that commerce which falls within the exclusive power of the federal government,* since it has been held, that the constitutional provision is not that Congress shall have power to regulate *all* commerce, but only such as has been expressly delegated to it, by the Constitution; that, therefore, Congress has no power to regulate that commerce which is carried on entirely within a State, and among its own citizens,† and that the transportation of persons and property between two places in the same State is no less domestic commerce, by reason of the fact, that these places are reached by a deviation to the soil of another State.‡

But, a corporation engaged in inter-state commerce cannot claim, under the provisions of the Act of Congress establishing the Inter-state Commerce Commission, the privilege of domestic rates upon goods shipped within a State, from without, where the shipment is made on a through bill-of-lading, for the reason, that, while the

*Paul v. Virginia, 8 Wall., 168.
†Stoutenburgh v. Hennick, 129 U. S., 141 (150), *per* Miller, J.
‡Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S., 192 (201).

corporation is not compelled, under that Act, to subject itself to such a contract, having once elected to enter upon the carriage of inter-state freight, and thus subjecting itself to the control of the Commission, it would not be competent for it to limit that control, in respect of foreign traffic, to certain points on its road, and exclude other points from the operation of the contract.*

The internal or domestic commerce of a State was defined by counsel in the case of *Gibbons* against *Ogden,*† to be, that trade, "which is wholly carried on within the limits of a State, as when the commencement, progress and termination of the voyage are wholly confined to the territory of the State;" and, this branch of commerce, says the same authority, "includes a vast range of state legislation, such as turnpike-roads, toll-bridges, auction licenses, licenses to retailers, and to hawkers and peddlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land and water."

Although this definition, taken as a whole, may not be technically correct, the principles upon which it is based, have never been denied; and, in the same case, *Mr. Chief Justice Marshall,* commenting upon the word "among," as used in the commercial clause of the Constitution, said, it means "intermingled with," and from

*Cincinnati, New Orleans & Texas Railway Co. v. Interstate Commerce Commission, 162 U. S., 184.

†9 Wheat, 1 (65); see also The Daniel Ball v. United States, 10 Wall., 557; Hall v. De Cuir, 95 U. S., 465; Western Union Telegraph Co. v. Texas, 105 id., 460; Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 id., 557.

this he concluded, that it was not intended, that the language used in the Constitution, comprehended that commerce, which is carried on between different parts of the same State; hence, it was necessary, he said, that, in order that the commercial power of Congress should apply to state commerce, such commerce should extend to, and affect, other States; and, that, "comprehensive as the word 'among' is," he added, "it may be very properly restricted to that commerce which concerns more States than one;" for a more extensive power would be not only inconvenient, but unnecessary. "The phrase is not one," he continues, "which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language of the subject of the sentence, must be exclusively internal commerce of a State. The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns, which affect the States generally; but not those which are completely within the particular State, and with which it is not necessary to interfere, for the purpose of executing some of the powers of government."

It is, therefore, an established doctrine, to which there is no exception, that the internal commerce of a State is

as much under its control, as foreign and inter-state commerce is under the control of the general government;* and, the existence of the federal right of supervision over inter-state and foreign commerce, and the consequent obligation upon the federal courts to protect that right from encroachment, on the part of the States, is not inconsistent with the power of each State to control its own internal commerce to any extent whatever.†

And, since the power to regulate their internal or domestic trade belongs exclusively to the several States, it follows, that Congress has no power of regulation, nor any direct control over it; and no interference by Congress, with the business of citizens, transacted within the limits of a State, is warranted by the Constitution, except such as is strictly incidental to the exercise of powers granted to the legislative department of the federal government.‡

These principles, however, apply only to that trade, which is confined to the territorial limits of the several States, and which forms the subject-matter of their internal, or domestic commerce. Hence, the doctrine, from which they arise, has never been extended, so as to include foreign and inter-state commerce, the regulation of

*Harman v. Chicago, 147 U. S., 396 (412); Reagan v. Mercantile Trust Co., 154 U. S., 413; Northern Securities Co. v. United States, 193 U. S., 197 (349); see also Sands v. Manistee River Improvement Co., 123 U. S., 288; Thompson v. Union Pacific Railroad Co., 9 Wall., 579; Railroad Co. v. Richmond, 15 id., 3.

†New York, Lake Erie & Western Railroad Co. v. Pennsylvania, 158 U. S., 431 (437); Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S., 192.

‡License Tax Case, 5 Wall., 462.

which is expressly vested, by the Constitution, in Congress, nor to the means, through which it is carried on; and, the power of the State to regulate this internal or domestic commerce, being, therefore, independent of that of the federal government, it has been said, that there is no reason, why, in the exercise of these respective powers, any collision should occur to disturb the harmonv of the federal and state governments, unless the former takes under its immediate control, and exclusive supervision, the entire subject to which the state legislation may refer;* and, in this case, the rule is, that, while the power of the courts to declare an act of state legislation unconstitutional, undoubtedly exists, it is one of great delicacy, particularly when brought to bear upon the legislative acts of another sovereignty.†

It is also a well recognized constitutional principle, that notwithstanding the delegation of the commercial power to Congress, the several States have surrendered none of their inherent powers over trade and commerce, except as to those branches, which are expressly enumerated in the Constitution; and, therefore, they may still exercise this power, free from the controlling power of the federal government,‡ in all those cases where its exercise is essential to the maintenance of the constitutional integrity of the States, or, where it is not necessary, to the exer-

*Missouri, Kansas and Texas Railway Co. v. Haber, 169 U. S., 613 (627).

†Scott v. Donald, 165 U. S., 58 (106), *per* Brown, J., citing Fletcher v Peck, 6 Cranch, 87 (128); Sinking Fund Cases, 99 U. S., 700 (718).

‡License Cases, 5 How., 504 (574).

cise of some power clearly granted to the federal government. This follows, not only from the language, in which the commercial power is vested in Congress, by the Constitution itself, but, also, from the nature of the subjects, upon which it is intended to operate, as well as from the effect of a contrary doctrine upon the whole mass of state powers. Hence, in the exercise any of its reserved powers, each State may regulate commerce, when such regulation does not fall within the range of the federal power, as defined in the constitutional grant,* or, when it is necessary to the exercise of some power, not delegated to the federal government, and which is required to maintain its separate political existence.

Besides the exclusive power of the States over their strictly internal or domestic commerce, and those subjects of a local nature which may be temporarily regulated, by state legislation, until Congress intervenes and establishes a national rule, there are other subjects falling within the scope of their reserved powers, which may still be exercised by them, notwithstanding the delegation of the commercial power to the federal government.†

Among these subjects are those which fall within the general power of the several States to legislate, concerning all matters, relating to persons and property, resident and being within their respective jurisdictions; to establish and control their own civil and political institutions, designed for the development of the resources, or for the advancement of the material prosperity of the State; to

*Cooley v. Board of Wardens, 12 How., 299.
†Gilman v. Philadelphia, 3 Wall., 713.

determine its public policy, by the exercise of its police power, and to maintain the political integrity of its government, and secure its successful administration, through the operation of the power of taxation

Concerning the general legislative power of the several States, the principle is well recognized, that, without some express limitation, contained in its own Constitution, each State has the right to declare the duties and obligations of its citizens and residents, to each other, and to the State; and this power necessarily includes the right to determine the social and political condition and *status* of those, who may fall within the scope of its operation; it relates to persons and property, and embraces acts of non-feasance as well as of misfeasance, and carries with it full authority to define and enforce the penalties, which may be considered necessary for the execution of the power, together with the right to establish the methods, through which its legislation shall be enforced.

The magnitude of the power itself, and the extent of its operation, is such as to render its further consideration here, impracticable; but, the general principles upon which it is based, with its relation to the power of Congress to regulate commerce, is very fully and clearly stated and illustrated, in the case of *Sherlock* against *Alling*,* which was determined by the Supreme Court of the United States, upon an appeal from the Supreme Court of the State of Indiana. The facts in that case were, that at the time the cause of action accrued, the defendant was the owner of a line of steamers, employed in navi-

*93 U. S., 99 (133 *et seq.*).

gating the Ohio River, between the ports of Cincinnati, in the State of Ohio, and Louisville, in the State of Kentucky, for the purpose of carrying passengers and freight and the United States mail; that, during one of their customary voyages, two boats of the same line collided, at a point on the river opposite the main-land of the State of Indiana; that, by the collision, the hull of one of the steamers was stove in, and a fire was started which burned the boat to the water-edge, destroying it, and causing the death of one of its passengers, a citizen of the State of Indiana. Upon these facts, the administrator of the deceased brought an action in the state courts of Indiana, under a statute of that State, which provided, "that when the death of one is caused, by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor, against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury from the same act or omission." Among the defenses set up, in bar of this action, was, "that at the time of the alleged injuries, the colliding boats were engaged in carrying on inter-state commerce, under the laws of the United States, and the defendant, as their owner, was not liable for injuries occurring in their navigation, through the carelessness of their officers, except as prescribed by those laws; and, that these did not cover the liability under the statute of Indiana." But the court, denied the sufficiency of this plea, and affirmed the judgment of the state court, in favor of the plaintiff, from which the appeal had been taken.

In delivering the opinion of the Supreme Court of the

United States, in this case, *Mr. Justice Field,* referring to the defendant's plea of immunity, said:—"Under this head, it is contended, that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injury complained of was caused by marine torts, without interfering with the exclusive power of commerce vested in Congress. The position of the defendants, as we understand it, is, that, as, by both the common and maritime law, the right of action for personal torts, dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and such enlarged liability, if applied to cases of marine torts would constitute a new burden upon commerce. In supposed support of this position, numerous decisions of this court are cited, by counsel, to the effect, that the State cannot, by legislation, place burdens upon commerce with foreign nations and among the several States. The decisions go to that extent, and their soundness is not to be questioned. But, on examination of the cases in which they were rendered, it will be found, that the legislation, adjudged to be invalid, imposed a tax upon some instrument or subject of commerce; or exacted a license fee from parties engaged in commercial pursuits; or created an impediment to the free navigation of some public water; or prescribed conditions, in accordance with which, commerce in particular articles or between particular places was required to be conducted. In all these cases the legislation condemned

operated directly upon commerce, either by way of tax upon its business, license in its pursuit in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases,* the law in New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In *Pennsylvania vs. Wheeling Bridge,* the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the River Ohio. In the case of *Sinnott vs. Davenport,* the statute of Alabama required the owner of a steamer navigating the waters of the State to file, before the boat left the Port of Mobile, in the office of the probate judge of Mobile County, a statement, in writing, setting forth the name of the vessel and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade, in the waters of the State, in addition to those prescribed by Congress. And in all the other cases where legislation of a State has been held to be null and void, for interfering with the commercial power of Congress, as in *Brown vs. Maryland, State Tonnage Tax Cases,* and, *Welton vs. Missouri,* the legislation created, in the way of a tax, license or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulation for the navigation or use of vessels.

It only declares a general principle respecting the liability of all persons within the jurisdiction of the State, for torts resulting in the death of parties injured. And, in the application of the principle, it makes no difference where the injury complained of occurred in the State, whether on land or water. Generally legislation of this kind, prescribing the liabilities and duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection, because it may affect persons engaged in foreign or inter-state commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed, on the death of its owner, because applicable to contracts or estates of persons engaged in such commerce."

To the same effect is the opinion of *Mr. Justice Matthews*, in the case of *Smith* against the *State of Alabama*,* when he said, that "A carrier, exercising his calling within a particular State, although engaged in the business of inter-state commerce, is amenable, according to the law of the State, for acts of nonfeasance and misfeasance, committed within its limits. If he fail to deliver goods to the proper consignee, at the time and place, he is liable in an action for damages, under the laws of the State, in its courts; or, if by negligence in transportation he in-

*124 U. S., 465 (477, 482); see also, Chicago, Milwaukee & St. Paul Railway Co., v. Solan, 169 U. S., 133; Missouri, Kansas & Texas Railway Co., v. Haber, id., 613; Atchison, Topeka & Santa Fé Railway Co., v. Matthews, 174 U. S., 96; Missouri, Kansas & Texas Railway Co., v. McCann, 174 U. S., 580.

flicts an injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local laws. In neither case would it be a defense, that the law giving the right to redress was void, as being an unconstitutional regulation of commerce by the State. . . . It is that law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules, according to which, under varying conditions, their conduct shall be measured and judged, which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible. But for the provisions on the subject found in the local laws of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu,* or *ex delicto,* to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or inter-state commerce, then in the absence of laws passed by Congress, or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does, until Congress expressly supplies it, or it is held by implication to have supplied it, in cases within its jurisdiction over foreign and inter-state commerce." In conformity with this opinion it was, therefore, held, that the rules, prescribed by a State, for

the construction, management and operation of railroads, within its territory, which are designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law, and are not *per se* regulations of commerce; and that, it is only when they operate, as such, in the circumstances of their application, and conflict with the expressed, or presumed, will of Congress exerted on the same subject, that they can be required to give way to the superior authority of the Constitution.

The doctrine, laid down, in these cases, is, therefore, that the legislation of a State, which is not directed against commerce, or its regulation, but relates to the rights, duties and liability of its citizens, to each other, and to the conduct by those who may be within such legislation, and which only indirectly and remotely affects the operations of that commerce, the regulation of which is vested in Congress, is obligatory upon all persons within their territorial jurisdiction, whether on land, or water, or engaged in commerce, foreign or inter-state, or in any other pursuit or calling. But, notwithstanding the inherent power of the States, in regard to these subjects, the doctrine has often been announced, that, so far as common carriers, engaged in the business of inter-state commerce, are concerned, Congress has the right under its power to regulate commerce, to exact, any guarantee, it may deem necessary for the public security, and for the faithful transaction of their business, including the authority to provide for contracts limiting their liability in any manner, where the subject of such regula-

tion, concerns the business of foreign or inter-state commerce.*

Of the civil institutions of the several states, designed for commercial purposes, and concerning which they have an inherent power of legislation, are highways, public banks, and other fiscal agencies, elevators and warehouses, and all similar institutions of a public, or *quasi* public nature, established, by their authority, for the convenience of transportation and traffic, and the corporations, through the instrumentality of which they are inaugurated and maintained.

Owing to the purposes for which it is established, a highway is a public road, which every citizen has the right to use. The term is generic, and, therefore, includes all public roads, whether they be formed by nature, such as rivers, lakes and other navigable waters, or whether they be artificial ways established for the convenience of the citizens of the State, by public authority, such as turnpikes, canals, railroads, ferries and bridges, operated independently, or in connection with some other road, the convenience of which they are built to conserve; and notwithstanding the fact, that highways may be created by dedication, there is no limit to the power of the State, in the matter of their establishment and regulation, other than that, which may be contained in its own Constitution, or in that of the United States. Therefore, public roads may be laid out, by the legislative action of the several States, exercised, either directly by the State, or

*See, Smith v. Alabama, 124 U. S., 465; Crutcher v. Kentucky, 141 U. S., 47; Pennsylvania Railroad Co. v. Hughes, 191 U. S., 477.

by delegated authority to its grantees, for that purpose, against the will of the original owner of the soil, over which it goes, or against the public right, and the Legislature of a State, may, at any time, discontinue their use, without restraint, from private citizens, claiming to be interested in their continued maintenance, as adjoining owners or otherwise.

Indeed, the establishment and maintenance of highways, for the convenience of the State and its people, has always been held to be one of the proper and important aims of civil government; and the authority, under which they are established and maintained, being, at the common law, a prerogative of the Crown, its exercise, by individuals involves the grant of a sovereign franchise, which, in this country, emanates from the legislative authority of the several States, as separate political communities, and as the legitimate successors to the prerogatives and jurisdiction of the British Crown, at the common law.*

Concerning the subject of highways, there is no reference, in the Constitution of the United States, nor is there any mention made, in that instrument, of the navigable streams of the country. Whatever power the general government has exercised or attempted to exercise over them, therefore, has always been done, in pursuance of some implied power, emanating from its military power; its treaty-making power; its power to regulate commerce; its power to establish post-offices and post-roads, or from the admiralty and maritime jurisdiction,

*Gibbons v. Ogden, 9 Wheat., 1.

conferred by the Constitution, upon the courts of the United States.

And, it was in the application of the doctrine of implication, based upon one or more of these general powers, that, as early as 1806, the Congress authorized the construction of the National or Cumberland road; enacted a statute,* in 1824, authorizing the President to cause surveys, plans and estimates to be made of the routes of such roads and canals, as he might deem of national importance, in a commercial and military point of view, or such as might be necessary for the transportation of the mails; and, at a much later date, incorporated the Union and Central Pacific Railroad Companies, as well as other trans-continental railways, and authorized the establishment of telegraph lines between important military posts of the West. To whatever extent this power may have been exercised, however, the inauguration of the policy upon which it was based, always met with strenuous opposition, on constitutional grounds, and its final adoption was only justified on the score of necessity, and, in order, the more effectually to carry out the purposes of some of the express constitutional powers of the United States.†

*Act of Cong., Apr. 30, 1824; 4 U. S. Stat., 22.

†Although Mr. Justice Bradley, speaking of the laws under which the several transcontinental railroad companies were incorporated and granted federal aid, in the construction of their lines, said, in the case of California *vs.* the Central Pacific Railroad Co. *et al.*, that "It cannot at the present day be doubted, that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies had authority to pass these laws," (assigning as a reason therefor, that the power to construct national highways and bridges from State to State, is essential to the

The navigable rivers and bays of the several States of the Union are their natural highways, and each State owns the bed of all such streams and tide waters within its territory;* and this ownership extends to the dominion and sovereignty over these waters, with the consequent right to use and dispose of any portion thereof, when that may be done, without substantial impairment, to the interest of the public, in them, subject only to the paramount authority of Congress, in the exercise of its commercial power, to control their navigation, so far

complete control and regulation of inter-state commerce) this statement has not been universally accepted, as historically true. Concerning the incorporation of the Union and Central Pacific Railroad Companies, and the necessity which called for their construction, Mr. Frank H. Spearman, writing for a recent issue of Harper's Magazine, says: "The political aspect of extending government aid to the building of the trans-continental railways must always remain an extraordinary feature of our national legislation. The Civil War alone made such a step possible. The period had rudely brushed aside constitutional and *laissez-faire* legislators and reasoning, and the men who stood in Congress for action went in this case to the other extreme. The building of the Pacific road had every war argument in its favor. Such a line, it was urged, would bind California more closely to the northern interest, and would enable the United States more promptly to repel any attack on the Pacific coast ports. Moreover, it would enable the government easily to control Indian outbreaks among those tribes still unreasonable enough to object to being exterminated." (The First Trans-continental Railroad, Harper's Magazine, Oct., 1904.) And in accordance with this view, in the case of Smith *vs.* Ames (169 U. S., 466-519), the Supreme Court of the United States has also declared, that the avowed purpose of the incorporation of these companies was "to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores of the United States." As to the several statutes, under which these companies were incorporated, see United States *vs.* Northern Pacific Railroad Co., 152 U. S., 284.

*Manchester v. Massachusetts, 139 U. S., 240 (259).

as it may be necessary for the regulation of commerce with foreign nations, among the several States, and with the Indian tribes.* This is an ancient principle of law, for as was said, by *Mr. Chief Justice Marshall,* in the case of *Martin* against *Waddell;*†—"When the Revolution took place, the people of each State became themselves sovereign; and, in that character, held the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the right, since surrendered by the Constitution to the general government." Subject to this right, therefore, the soil under all navigable streams, within the terri-

*Illinois Central Railroad Co. v. Illinois, 146 U. S., 387 (410); Shively v. Bowlby, 152 U. S., 1; Illinois v. Illinois Central Railroad Co., 184 U. S., 77; United States v. Mission Rock Co., 189 U. S., 391 (404); see also, Pollard's Lessee v. Hagan, 3 How., 212; Weber v. Harbor Commissioners, 18 Wall., 57; McCready v. Virginia, 94 U. S., 391 (394); Hardin v. Jordan, 140 U. S., 371 (381). "Although the power of changing the common law rule as to streams within its dominion belongs to each State, two limitations must be recognized," says the Supreme Court of the United States, "First, that in the absence of specific authority from Congress a State cannot, by its legislation destroy the rights of the United States, a- owners of lands bordering on a stream, to the continued flow of its waters; so far, at least, as it may be necessary for the beneficial uses of the government property; and secondly, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigation of the navigable water courses of the country, even against any State action." See United States v. Rio Grande Dam & Irrigation Co., 174 U. S., 690.

†16 Pet., 367; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S., 349.

torial limits of a State, is owned by the State, in which they are located, and are governed by the local laws of that State, and its jurisdiction extends even to the waters of such streams.* Hence, in the case of *Prosser* against the *Northern Pacific Railroad Company*,† *Mr. Justice Gray*, laid down the doctrine, "that a State, by its legislature, or through a Board of Harbor Commissioners, may establish, for the purpose and benefit of commerce and navigation, harbor lines, in navigable waters, not inconsistent with any legislation of Congress limiting the building of wharfs and other structures, upon lands not already built upon." And, to the same effect, it has also been held, that, subject to the paramount jurisdiction of Congress, the several States have the power to authorize the construction and maintenance of levees, drains and other works, necessary and suitable for the reclamation of swamp and overflowed lands, within their limits.‡

Therefore, each of the several States may, at any time, exercise full authority and control over its navigable streams, except as restrained by the federal Constitution,

*Shively v. Bowlby, 152 U. S., 1; Atlee v. Union Packet Co., 21 Wall., 389; Davenport & Northwestern Railroad Co. v. Renwick, 102 U. S., 180; Barney v. Keokuk, 94 U. S., 324.

†152 U. S., 59.

‡Leovy v. United States, 177 U. S., 621 (625). In this case, it was held, that the Act of Congress of September 19, 1890 (26 U. S. Stat. 423), which prohibits the building of wharves, piers, *etc.*, upon navigable streams, without the permission of the Secretary of War, did not deprive the States of authority to bridge such streams, or render lawful all bridges previously built without authority, but, that it simply created an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.

and the laws of Congress enacted in pursuance of its provisions.*

The authority of the federal government over the navigable streams of the United States, however, being implied alone from the meaning of the term commerce, as defined by the Supreme Court of the United States, it is clear, that the power of Congress over their regulation, extends only to the control of their navigation as means of commercial intercourse between the United States and foreign nations and among the several States; and this view of the subject was the basis of the contention of counsel, in the case of *Veazie* against *Moor*,† by whom it was urged, that Congress has no constitutional authority to interfere with, or regulate the navigable streams of any State, even where they are common to two or more States, except in so far as their navigation is used for the purposes of that commerce, which falls legitimately within the regulating power of the general government; for, as it was argued, neither the land nor the waters, within a State, compose any part of commerce, but are only subject to be adopted, as ways or thoroughfares of commercial intercourse over them, whenever they may be required for the wants of either. If this be so, and such seems to have been the conclusion of the

*Sands v. Manistee River Improvement Co., 123 U. S., 288 (296), citing Permoli v. First Municipality of New Orleans, 3 How., 589; Pollard's Lessee v. Hagan, id., 212; Escanaba & Lake Michigan Transportation Co., v. Chicago, 107 U. S., 678; Van Brocklin v. Tennessee, 117 U. S., 151; Huse v. Glover, 119 U. S., 543.

†14 How., 568.

court, in that case, then it is apparent, that the federal government can do no act concerning the navigable waters within the limits of the United States, which, or a corresponding act to which, it cannot do on the land within the same limits, unless the very act, the constitutionality of which is brought in question, be one arising under the admiralty and maritime jurisdiction of the United States.* Hence, the navigable waters of the United States belong no more to the federal government, and are not otherwise affected by the Union, nor the grant of the power to regulate commerce, than the land itself. Both are equally subject to the jurisdiction of the general government, for the exercise of all those powers which have been delegated to it, by the Constitution, and both are equally subject to the jurisdiction of the several States, for the exercise of those powers, which are inherent in their sovereignty as independent States; and this jurisdiction extends even to those navigable streams,

*The admiralty and maritime jurisdiction of the United States is entirely separate and distinct from, and operates wholly independent of the commercial power of Congress. It does not affect the jurisdiction nor the legislation of the several States, over their territory, except in so far as such jurisdiction and legislation be exercised so as to conflict with the admiralty jurisdiction of the federal government, and with such laws as may have been passed by Congress in pursuance thereof. (See United States vs. Bevans, 3 Wheat., 336; Smith v. Maryland, 18 How., 71; Manchester v. Massachusetts, 139 U. S., 240-261.) The admiralty jurisdiction does not, therefore, depend upon the commercial power of Congress at all; but exists even where the voyage or contract, if maritime in its character, is made, or is to be performed, wholly within a single State. (*In re* Garnett, 141 U. S., 1 (45); The Robert W. Parsons, 191 U. S., 17.)

which are employed for the purposes of foreign and inter-state commerce.*

But, if a navigable stream, wholly within the territory of a State, connect with other rivers or bodies of water, through which vessels starting, upon it, may proceed to adjoining States or foreign countries, it is held to be a navigable river of the United States, and as such, is under the control of the general government, to the full extent of its power to regulate foreign and inter-state commerce, and so far as may be necessary to insure its free navigation for that purpose; and whenever this limitation upon the power of the States applies, the power of Congress is paramount, and extends even to the abatement of any obstruction to their navigation, erected by authority of the State,† for "when Congress chooses to act, it is not concluded by anything that the States, or that individuals, by their authority or acquiescence, have done, from assuming entire control of the matter, and abating any obstruction that may have been made, and preventing others from being made, except, in conformity with such regulations as it may impose."‡ And, the application of the same principle has been extended, so as to include those cases where the waters, within the

*Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Gilman v. Philadelphia, 3 Wall., 713; Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How., 421; Cooley v. Board of Wardens, 12 How., 299; *Ex parte* McNiel, 13 Wall., 236; The James Gray v. The Thomas Frazer, 21 How., 184; Chicago & Northwestern Railroad Co. v. Fuller, 17 Wall., 560.

†See Chicago & Northwestern Railroad Co., v Fuller, 17 Wall., 560; Cardwell v. American Bridge Co., 113 U. S., 205.

‡United States v. Billingham Bay Broom Co., 176 U. S., 211 (215).

States, are non-navigable and are merely tributaries to other streams, which, by the process of accretion, become navigable streams, beyond the limits of those States, in which they take their rise. Thus in referring to the Acts of Congress of July 26th, 1866,* of March 3d, 1877,† and of March 3, 1893,‡ relating to the possession of and the right to use waters of non-navigable streams, for mining, agriculture, manufacturing and other purposes; to the irrigation of arid lands, and to timber culture, it was held that the purpose of these Acts was to determine the assent of Congress to the appropriation of water, in contravention of the common law rule as to continuous flow, but, that no inference could be drawn, from them, that Congress, intended to release its control over the navigable streams of the country, and to grant, in aid of mining and other industries and for the reclamation of arid lands, the right to appropriate the waters on the sources of navigable streams, to such an extent as to destroy their navigation; and, in this connection, it has been said, by the Supreme Court of the United States, that, "To hold, that Congress, by these acts meant to confer, upon any State, the right to appropriate all the waters of such tributary streams, which unite into a navigable water course, and to destroy the navigability of that water-course, in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.§

*14 U. S. Stat., 253.
†10 U. S. Stat., 77.
‡26 U. S. Stat., 1101.
§United States v. Rio Grande Irrigation Co., 174 U. S., 690.

However, although the power of Congress to pass laws for the regulation of the navigation of public rivers, within the United States, and to prevent all obstructions therein, cannot be questioned, it has been held, that, until it does pass some such law, there is no common law of the United States, which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction; and, that without an Act of Congress, on the subject, such obstructions and nuisances are offenses against the laws of the States, within which the navigable streams lie, and as such, may be indicted or prohibited by these laws, since they are not offenses against United States laws, which do not exist;* but when Congress does take affirmative action in the matter, waters which are navigable, in themselves, or which connect with other navigable streams, so as to form a continuous water way to other States and foreign countries, cannot be obstructed or impeded, so as to impair, defeat or place burdens upon a right to their navigation granted by Congress.†

So, it has been said, that the authority of Congress to regulate the navigation of the pubilc waters of the United States, under its commercial power, has reference only to their navigation, in their natural state; for the Constitution does not contemplate, that such navigation might not be improved, by artificial means, in the re-

*Willamette Iron Bridge Co., v. Hatch, 125 U. S., 1; see also, Mann v. Tacoma Land Co., 153 U. S., 273,

†Harman v. Chicago, 147 U. S., 396.

moval of obstructions; the making of dams, or, by deepening the waters, or turning, into a river, waters, from other streams, to increase their depth. Hence, it has been held, that that provision of the Ordinance of 1787, which requires, that all navigable streams, within the Territory, for the government of which that ordinance was passed, "shall be highways without any tax, imports or duties," has reference to their navigation, in their natural state, and does not contemplate, that such navigation might not be improved, by artificial means, under the authority of the States through which these streams may flow.* So, of the Act of Congress of February 14th, 1859, providing for the admission of Oregon, as a State in the Union, it was held, that the section of the Act, which declares, that all the navigable waters of that State shall be common highways, and forever free to all the citizens of the United States, does not refer to "physical obstructions," upon those streams, but to "political regulations," which would hamper the freedom of commerce.† And, in further recognition of the right of the several States to exercise governmental control over the navigable streams, within their limits, even in the face of congressional action, the Supreme Court of the United States has declared, that the Act of Congress of March 1, 1817, which provides for the free navigation of the Mississippi River and its navigable tributaries, was not designed to inhibit the power of the States—which is "inseparable from every sovereign and

*Huse v. Glover, 119 U. S., 543; Sands v. Manistee River Improvement Co., 123 U. S., 288 (296).

†Willamette Iron Bridge Co., v. Hatch, 125 U. S., 1.

efficient government"—to devise means and to execute measures for the improvement of the State, and for the advancement of its general welfare, although such means might induce, or render necessary, changes in the channels or courses of rivers within the interior of the States, or might be productive of a change in the value of private property;* and, that, neither the Act of Congress of March 3d, 1899, nor any previous Act of Congress, relating to the erection of structures in the navigable waters of the United States, manifests any purpose, on the part of Congress to assert the power to invest private persons, with the right to erect such structures, in such waters wholly within the territorial limits of a State, without regard to the wishes of that State, or without its authority;† and, the mere fact, that Congress may have made appropriations for the improvement of rivers, within the limits of a State, does not constitute an assumption of judisdiction over such rivers, by the federal government, so as to prevent the State from legislating upon the subject,‡ a doctrine which is in full accord with the conclusion reached in the case of the *Henderson Bridge Company* against the *Commonwealth of Kentucky*,§ that the purpose of the Act of Congress of December 17th, 1872, entitled "An Act to authorize the construction of bridges across the Ohio River, etc.," was merely to regulate the height of bridges over that river

*Withers v. Buckly, 20 How., 84; Leovy v. United States, 177 U. S., 621 (631).

†Cummings v. Chicago, 188 U. S., 410.

‡United States v. Billingham Bay Broom Co., 176 U. S., 211.

§166 U. S.. 150.

and the width of their spans, in order that they might not interfere with navigation, and that the Act confers no right or franchise, on the company to erect a bridge or collect tolls for its use.

And, whatever may be the extent of the power of the several States, over the navigable waters within their limits, the doctrine has long since been established, that the nature of the commercial power of Congress is such, that, when, in its judgment, the action of a State respecting the improvement of one of its navigable streams, is deemed to encroach upon its navigation, as a means of foreign or inter-state commerce, that body may interfere and control the whole matter, and entirely supercede state action, by some action of its own; and when Congress has, by any expression of its will, occupied the field, its determination is conclusive of any right to the contrary, asserted under State authority.*

This power on the part of the several States is, therefore, temporary in its nature, and may be superceded, at any time, by the exercise of the paramount authority of Congress; and the exercise of this authority, on the part of Congress, has been accomplished, to some extent, at least, by the passage of the Act of September 19th, 1890,† which provides, that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited;

*Green Bay & Mississippi Canal Co., v. Patten Paper Co., 172 U. S., 58 (81); Wisconsin v. Duluth, 96 U. S., 379 (387).

†26 U. S. Stat., 454.

and, in passing upon the scope and effect of this Act of Congress, *Mr. Justice Brewer,* said, in the case of the *United States* against the *Rio Grande Dam & Irrigation Company** "whatever may be said, in reference to obstructions existing, at the time of the passage of the Act, under the authority of state statutes, it is obvious, that Congress meant, that thereafter no State should interfere with the navigability of a stream, without the condition of national assent;" that the Act "is not a prohibition of any obstruction to navigation, but an obstruction to the navigable capacity, and anything, wherever done, or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable waters of the United States, is within the terms of the prohibition," and that, "evidently, Congress perceiving that the time had come when the growing interests of commerce required, that the navigable waters of the United States should be subject to the direct control of the National Government, and that nothing should be done, by any State tending to destroy that navigability, without the explicit assent of the National Government enacted the statute, in question."

In the exercise of this paramount power, over the navigable streams of the Union, Congress has never hesitated to authorize the improvement of such streams within the limits of any State, whenever the requirements of commerce has seemed to require such improvement. And, under the doctrine suggested in the case of *Gibbon* against *Ogden,* and more positively, succinctly and affirmatively

*174 U. S., 690.

laid down, in other cases,* since determined by the Supreme Court of the United States, this power extends not only to the improvement of such streams, but also to their regulation in other respects, and although the title to the shore, as well as to the submerged soil, under them, is conceded to be in the several States, through which they flow, this title is nevertheless subject to the servitude, created in favor of the citizens of all the States as well as the subjects of foreign nations, by the delegation of the power to regulate commerce to the federal government.

Subsidiary to, and dependent upon the power of the States over the navigable waters, within their respective territories is the power of establishing and regulating ferries and bridges, since these are but means of crossing, and, the power concerning the one, implies the power in respect of the other.

A ferry is said to be a public highway of a special description, and its *termini* must be in places where the public have rights, such as towns or villes, or highways leading to towns or villes.

The right to establish and maintain a ferry, like that of maintaining any other highway, is, therefore, a franchise, because it does not exist of common right, and must necessarily emanate from the sovereign power of the State, in whose limits and dominion it is intended to operate; and although there may be a preference given to the owners of the soil where the *termini* are fixed, it is neverthe-

*Scranton v. Wheeler, 179 U. S., 141, citing South Carolina v. Georgia, 93 U. S., 4; Shively v. Bowlby, 152 U. S., 1; Eldridge v. Trezevant, 160 U. S., 452.

†See Charles River Bridge Co., v. Warren Bridge, 11 Pet., 419.

less a franchise, and authority from the State must be shown, in order to justify the exercise of any right therein, by an individual, or a collection of individuals, to whom it is granted. And, since the right of establishing ferries, at the common law, was a perogative of the Crown, it follows, that its exercise, in this country, has always been recognized as being within the inherent power of the several States; and, for this reason, Congress has never undertaken to grant the franchise of maintaining and operating a ferry; and being a sovereign franchise, belonging to the several States, it is necessarily subject to state regulation, in all matters not inconsistent with the power vested in Congress to regulate commerce conducted over the navigable streams upon which it is used;* but, in a recent case, it was held, by the Supreme Court of the United States, that even conceding, that the police power of a State extends to the establishment, regulation and licensing of ferries on navigable rivers, which are boundaries, between it and another State, "there is no decision of this court, importing power in a State to directly control inter-state commerce, or any transportation by water, across such a river, which does not constitute a ferry, in the strict technical sense of the term."†

So, the power of the several States, to construct or authorize the construction and maintenance of bridges across navigable streams, upon like principles, has always been conceded to be within the inherent power of the respective

*Minturn v. La Rue, 64 U. S., 435; Fanning v. Gregoire, 16; How., 523.

†St. Clare County v. Interstate Sand & Car Transfer Co., 192 U. S., 454.

States, and that, therefore, it does not pertain to the commercial power of Congress; for it is said, that neither the business of keeping a ferry nor the operation of a bridge, is commerce within the meaning of the Constitution of the United States, in the sense that it must be free from state control;* and, while such establishments are merely connecting links of turnpikes, streets and railroads, and the commerce over them may be greater than over the streams which they cross, a break in the line of communication, from the want of a bridge, may produce greater inconvenience to the public, than the obstruction to navigation caused by such a structure, with proper draws; and, for this reason, it is urged, that the local authorities of the States, can best determine which of two modes of transportation should be favored, and how far either should be subservient to the other.

Therefore, the United States Supreme Court has often held, that, when this authority is exercised, by the States, in the building of bridges, what the form and character of the structures shall be, at what height they shall be erected, of what material constructed, and whether they shall be with or without draws, are matters for State regulation, subject only to the power of Congress to prevent any unnecessary obstruction to the navigation of the streams over which they are built; and until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When, therefore, the State provides for the form and character of such a structure, its direction will control, except as

**Semble* County of Mobile, v. Kimball, 102 U. S., 691 (702).

against the action of Congress, whether the bridge be with, or without, draws, and irrespective of its effect upon navigation.*

Hence, for outlays, caused by the erection and maintenance of such structures, the States may exact, or authorize the exaction of reasonable tolls, they being in the nature of charges for the use of docks and wharfs and other local facilities constructed for the landing of persons and freight, and the taking of them on board, or for the repairs of vessels, and the storage of merchandise. This power on the part of the States arises from its authority to authorize any improvement to be made, upon its navigable streams, which, in its judgment, will enhance their value, as means of transportation, from one part of the State to another, and to meet the cost of such improvement, the State may levy a general tax, or exact a toll, or authorize its grantees to collect a charge, from all, who avail themselves of the improvement thus authorized and maintained;† and, the exaction of tolls, authorized by the statute of a State, for this purpose, is not in contravention of the Fourteenth Amendment of the Constitution, which declares, that no State shall deprive any person of life, liberty or property, without due process of law.‡ The tolls, so exacted, however, must be compensatory and not discriminatory in their nature; and, therefore, it has been held, that a local ordinance, exacting from vessels, using the

*See, Gilman v. Philadelphia, 3 Wall., 713; Hamilton v. Vicksburg, Shrevesport & Pacific Railroad Co., 119 U. S., 280.
†Lindsley & Phelps Co. v. Mullen, 176 U. S., 126.
‡Sands v. Manistee River Improvement Co., 123 U. S., 288.

wharfs of a city, and ladened with products from other States, higher rates of wharfage, than from vessels ladened with products of the State in which it is located, is a burden upon inter-state commerce, and, for that reason is void.*

However, since these establishments are important means and instruments of commerce, falling within the definition of that term, as given by the Supreme Court of the United States, and, since they may be employed in that commerce which falls within the regulating power of Congress, the application of these doctrines cannot be lawfully and successfully invoked, when it becomes necessary to insure that freedom of intercommunication, which is essential to the unobstructed movement and operation of foreign and inter-state commerce, and which it was one of the designs and purposes of the framers of the Constitution to guard and protect from hostile state legislation; and, it is in pursuance of the power, vested in the federal government to regulate commerce, that Congress has always exercised its authority to legalize bridges over navigable streams, built under state authority, whenever the structure, in question, after its erection, interferes with the navigation of the stream; or, before it is built, to prescribe the manner of its construction, either by determining the height of its piers, the length of its spans, the place where such spans may be located, in reference to the current, to fix the draws, or make any other regulation of a like nature; or, after its

*Guy v. Baltimore, 100 U. S., 434; see also, Minnesota v. Barber, 136 U. S., 313 (325).

construction, to cause an abatement of the bridge, as a nuisance, obstructing the free navigation of the stream, if it shall prove to be an interference with commerce, carried on over a navigable stream, with foreign nations and among the several States.*

Upon the theory, that the power to regulate commerce, delegated by the Constitution to Congress, was not the power to establish commerce, nor the means and instruments through which it should be carried on, but, that it was only the power to regulate such means and instruments, after their establishment by individual enterprize, or by the State itself, it was early contended, that Congress had no right to construct or authorize the construction of bridges, or other highways, within the limits of any of the States; and, that, therefore, its powers over these institutions of the States extended only to the right to regulate them when adopted for the uses of interstate and foreign commerce.

In support of this theory, *Mr. Justice McLeon,* delivering a dissenting opinion, in the case of the *State of Pennsylvania* against the *Wheeling & Belmont Bridge Company,*† very aptly said:—"This power may have been asserted, in regard to post-roads, but, the settled opinion now, seems to be, that to establish post-roads, within the meaning of the Constitution, is to designate them. In this sense Congress may establish post-roads, extending over bridges, but it can neither build them, nor exercise

*Conway v. Taylor's Executors, 1 Black, 603; Gibbons v. Ogden, 9 Wheat., 1; Fanning v. Gregoire, 16 How., 524; Wiggins Ferry Co. v. East St. Louis, 107 U. S., 365.

†18 How., 421.

any control over them, except the mere use, for the convenience of the mails, on paying tolls;" to which he added, that "the same power that would enable Congress to build a bridge, over a navigable stream, would authorize it to construct a railroad or turnpike road, through the States of the Union, as it might deem expedient."

And, without passing upon the question of the power of Congress to construct or authorize the construction of bridges, railways or turnpikes, the same views were substantially set forth, with the approval of the Supreme Court of the United States, in the more recent case of *Gilman* against the *City of Philadelphia,* when *Mr. Justic Swayne,* delivering its opinion, said:—"It must not be forgotten, that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce, which passes over a bridge may be much greater than would be ever transported on the waters it obstructs. It is for the municipal power to weigh the considerations, which belong to the subject, and to decide which shall be preferred, and how far either shall be subservient to the other. The States have always exercised the power, and, from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, to the paramount power of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation."

Subject to this single exception, therefore, it is an old and familiar doctrine, that the power of the several States

to establish highways, within their respective domains, to determine the means, through which they may be constructed, and to control the manner of their operation, so as to secure their equal and impartial use to the public, is without limitation; and, this doctrine has been held to apply, not only to rivers, lakes and navigable arms of the sea, which constitute the natural highways of the State, but also, to those artificial highways, which form a part of its general system of internal improvements, such as turnpikes, canals and railways, as well as to warehouses, elevators and wharfs, the right to construct and maintain which is based upon a public franchise, or, the business of which, from its essential nature, is charged with a public interest; and, the unimpaired exercise of this power has always been justified, on the ground, that it is one of those powers, inherent in every State, to the extent of its dominion, to determine the character of its own political and civil institutions, as well as the conditions, under which they shall be established and allowed to exist. It was never surrendered to the federal government, by the Constitution of the United States, and the right of the States to regulate their operations, extends as well to the tangible property, as to the individuals and corporations, by and through the means of which such improvements are established and maintained, for the public use.

Nevertheless, a distinction has sometimes been attempted to be made, between the powers of the States, to control corporations created, and organized, for these purposes, and the business of individuals, engaged in like pursuits.

And, this distinction finds support, in the fact that a corporation, created and organized for the purpose of constructing, maintaining and operating a public highway, like all other corporations, is a creature of the law, and, as such only exists and exercises its franchises, in virtue of a grant, emanating from the legislative authority of the State, to which it owes its existence; and, it is also a fact, of no less importance, that if the corporate business is intended to be conducted in other States, it must show the consent or acquiescence of such States, in order to justify its operations, within their territory.

The power of the several States to create corportions for the improvement of its highways, or for any other purpose, has never been denied; and, unless restrained by some positive provision of its own Constitution, or of the Constitution of the United States, it is a general principle that each State has the inherent power to create corporations, for the construction, and maintenance of its highways; to determine the conditions, under which their charter may be granted, and to regulate the manner of their operation, after their establishment; and, being a matter resting wholly within the discretion of the State, granting the franchise, charters to such corporations may be withheld altogether, or they may be granted, upon such terms and conditions as the State may deem proper to impose, in the interest of the public, or for the general welfare of the State, as well as in justice to the incorporators,* to which such charters may be granted.

*Louisville & Nashville Railroad Co. v. Kentucky, 183 U. S., 503.

Therefore, any State, granting a charter of incorporation to construct, maintain and operate one of its highways, may impose, as a condition of the grant, the payment of a specific sum, at the time of incorporation, or it may exact a like condition for the exercise of the franchise, by requiring the payment of a certain portion of its gross receipts, to be determined by the future operations of the corporation.*

It is also a principle, applicable to all bodies-politic and corporate, that being a creature of the law, existing and exercising its functions, only in virtue of its charter, a corporation is essentially local in its character; and, for this reason, no corporation can have any legal existence, nor can it exercise and enjoy any of its rights, powers and immunities, beyond the limits of the State, to which it owes its existence, unless so empowered, by its charter; nor can it enter the bounds of another State, for the transaction of business there, except upon the consent or acquiescence of that State.

Each of the several States have, therefore, the inherent power to fix the terms upon which its own corporations may be created, and the conditions under which their corporate franchises may be exercised, and it must necessarily follow, that they may impose the same conditions, upon corporations created by other States, seeking to transact business within its territory; and, its power, in this respect, implies the power to exclude them altogether, and includes the right to enact and enforce all

*See Maine v. Grand Trunk Railroad Co., 142 U. S., 217 (228); Horn Silver Mining Co. v. New York, 143 U. S., 305 (313).

legislation, which may be directly or incidentally requisite, to render the enforcement of this implied power efficacious;* and the exercise of this power, of course, carries with it, the right to discriminate, in favor of its own corporations, and, without some constitutional limitation, to the contrary, a State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions, as it may deem proper, and the acceptance of these conditions, implies a submission to the terms, without which the franchise could not have been obtained.†

And, to the same effect, is a recent decision of the Supreme Court of the United States, under which it was determined that the purchasers of a railroad, having no right to be incorporated, under the laws of the State in which the road is located, but, who voluntarily accept the privileges and benefits of an incorporation law of that State, are bound by the provisions of a statute, regulating the rates of fares to be charged, for transportation over the road, and they are estopped from repudiating the burdens attached, by the law, to the privilege of becoming a corporation.‡

Indeed, such is the extent of this doctrine, that it has often been held, that Congress has no authority to permit

*Hooper v. California, 155 U. S., 648 (656); Crutcher v. Kentucky, 141 U. S., 47; Chattanooga National Building & Loan Association v. Denson, 189 U. S.. 408.

†Ashley v. Ryan, 153 U. S., 436.

‡Grand Rapids & Indiana Railroad Co. v. Osborne, 193 U. S., 17.

corporations, created by one State to enter and transact business in another State, without the permission or consent of the latter;* and, that the power of one State to determine the conditions upon which corporations, created by another State, may enter and transact business within its territory, is not restricted by that clause of the federal Constitution,† which guarantees, to the citizens of each State, all the privileges and immunities of the citizens of the several States, nor does the exercise of this power, on the part of the several States, conflict with the pro-

*Bank of Augusta v. Earle, 13 Pet., 519; Laffayette Insurance Co. v. French, 18 How., 404; Society for Savings v. Coite, 6 Wall., 594; Provident Institution v. Massachusetts, id., 611; Hamilton Co. v. Massachusetts, id., 632; Paul v. Virginia, 8 id., 168; Ducat v. Chicago, 10 id., 410; State Tax on Gross-Receipts, 15 id., 284; Union Pacific Railroad Co. v. Peniston, 18 id., 5; Delaware Railroad Tax Case, id., 206; State Railroad Tax Cases, 92 U.S., 575; Cooper Manufacturing Co. v. Ferguson, 113 U. S., 727 (732); Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S., 326; Pembina Mining Co. v. Pennsylvania, 125 U. S., 184; California v. Central Pacific Railroad Co., 127 U. S., 1; Home Insurance Co. v. New York, 134 U. S., 594; Maine v. Grand Trunk Railroad Co., 142 U. S., 217; Ashley v. Ryan, 153 U. S., 436 (445); Hooper v. California, 155 U. S., 648; Waters-Pierce Oil Co. v. Texas, 177 U. S., 28; Chattanooga National Building & Loan Association v. Denson, 189 U. S., 405. See also, St. Clair v. Cox, 106 U. S., 350; Crutcher v. Kentucky, 141 U. S., 47; Blake v. McClung, 172 U. S., 239.

†Const. U. S., Act. iv., Sec. ii., ce. 1; Bank of Augusta v. Earle, 13 Pet., 519; Paul v. Virginia, 8 Wall., 168; Ducat v. Chicago, 10 Wall., 410; Memphis & Charleston Railroad Co. v. Alabama, 107 U. S., 581; Philadelphia Fire Association v. New York, 119 U. S., 110; Pembina Mining Co., v. Pennsylvania, 125 U. S., 184 (187); Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S., 114; St. Louis & San Francisco Railroad Co. v. James, 161 U. S., 545; St. Joseph & Grand Island Railroad Co. v. v. Steele, 167 U. S., 659.

visions of the Fourteenth Amendment of that instrument.*

In consequence of the application of these general principles, therefore, it has sometimes been held, that, the power of the States to control all corporations doing business within their jurisdiction, even applies to corporations created for the purpose of inter-state carriage of persons and property, and, that the mere fact, that they are established for the purpose of engaging in that commerce, the regulation of which falls within the constitutional power of Congress, does not of itself take from the several States, in which they operate, the right to determine the conditions, under which their business may be conducted.†

These conclusions, it is apparent, result from a logical consideration of the general principles, underlying the whole law of bodies-politic and corporate, and arise from the relation, which all corporations bear to the creating power of the State, from which their charters are derived, as well as from the power of the States, in which they desire to exercise those rights, privileges and

*Pembina Mining Co. v. Pennsylvania, 125 U. S., 184; Barbier v. Connolly, 113 U. S., 27; Soon Hing v. Crowley, id., 703; Missouri v. Lewis, 101 U. S., 22 (30); Missouri Pacific Railroad Co. v. Humes, 115 U. S., 512; Yick Wo v. Hopkins, 118 U. S., 356; Hayes v. Missouri, 120 U. S., 68; see, however, Santa Clara County v. Southern Pacific Railroad Co., 118 U. S., 394; Smith v. Ames, 169 U. S., 466.

†Chicago & Northwestern Railroad Co. v. Wittan's, Administrator, 13 Wall., 270; Ohio & Mississippi Railroad Co. v. Wheeler, 1 Black, 286; Baltimore & Ohio Railroad Co. v. Maryland, 21 Wall., 456; Stone v. Farmers' Loan & Trust Co., 116 U. S., 307.

immunities, which are granted to them by the act of incorporation.

If, therefore, the subject be considered in relation to these principles alone, the conclusions derived from them would be sound; but, inasmuch as the Constitution of the United States constituted and established a government, capable of acting, and exercising its functions, independently of the States, and since the States, by the adoption of that Constitution, surrendered to the federal government, the power to regulate commerce, it follows, that no State may exercise any authority over its own corporations, or those of other States, doing business within its domain, where the subject-matter of its exercise is commerce with foreign nations, among the several States and with the Indian tribes; or where the corporation is created, by the United States, for the accomplishment of any of its constitutional purposes, or, where, for like purposes, corporations created by any of the States, is vested with some privilege, granted by the federal government.

Hence, it has been held,* that the general principles, applicable to the power of the States, concerning corporations, are always to be taken with the qualification, that no State, may under the guise of corporate regulation, interfere with the operations of corporations, created by Congress, for federal purposes; nor, may it

*McCulloch v. Maryland, 4 Wheat., 316 (411, 422); Luxton v. North River Bridge Co., 153 U. S., 525 (529). See also Fort Levenworth Railroad Co. v. Lowe, 114 U. S., 525; Chicago, Rock Island & Pacific Railroad Co. v. McGlinn, id., 542; Easton v. Iowa, 188 U. S., 220; Benson v. United States, 146 U. S., 325.

impose conditions, for the privilege of doing business within its jurisdiction, upon corporations, created by one State, and whose right to enter another, depends upon the federal business for which they are created.* Consequently, the principle is now well settled, that a corporation, created by Congress, or a corporation or a citizen of one State, employed in the business of the general government† or engaged in the performance of, or in the exercise of any privilege enjoined by, or bestowed, upon them, by the Constitution and laws of the United States, are free from all state control.‡

In arriving at these conclusions, however, the decisions have not always been uniform; and at the very beginning of its existence, as a nation, it was contended, by eminent authority, that the United States had no power to create corporations, the contention to this effect having been based upon the assumption, that the power to create corporations is an inherent sovereign power, belonging to the States, prior to the adoption of the federal Constitution, that it was not expressly enumerated, among the powers

*Hooper v. California, 155 U. S., 648, citing Western Union Telegraph Co. v. Texas, 105 U. S., 460; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S., 326; McCall v. California, 136 U. S., 104; Norfolk & Western Railroad Co. v. Pennsylvania, id., 114; Pickard v. Pullman Southern Car Co., 117 U. S., 34; Robbins v. Shelby County Taxing District, 120 U. S., 489; Leloup v. Port of Mobile, 127 U. S., 640; Asher v. Texas, 128 U. S., 129; Stoutenburgh v. Hennick, 129 U. S., 141; Crutcher v. Kentucky, 141 U. S., 47. See also, New York v. Roberts, 171 U S., 658.

†Pembina Mining Co. v. Pennsylvania, 125 U. S., 184.

‡Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18; Same v. Hayward, id., 36.

granted to the federal government, by that instrument, and, that it, therefore, remained, with the States, unimpaired by any of its provisions, and that the power could not be exercised by Congress, for any purpose.*

Although this question was ultimately determined adversely to the claim, then made in favor of the exclusive existence of the power in the several States, at least, in so far as corporations created for federal purposes are concerned, the question, as to the power of Congress to interfere with state corporations, either by restricting the powers granted to them, by their charters, by enlarging these powers, or, by conferring franchises, not granted, to them, by the States was not settled for many years. Thus,

*As is well known, the question of the power of the United States to create corporations was first raised, and the existence of this power was determined, both by the executive and legislative branch of the government, in the establishment of the original United States Bank, under the plan proposed by Mr. Hamilton. The plan was opposed by Mr. Jefferson and other members of the President's cabinet, upon the grounds, stated in the text; but the views of its author were adopted, and the bank was established, under an act of incorporation granted by Congress. When the question of the constitutionality of that act came to the Supreme Court of the United States for determination, it was sustained, the court holding, that, although the power, under which this act was passed, was not expressly enumerated, in the Constitution, it was nevertheless a substantial power, which arose, by implication, from other enumerated powers, and might be exercised in all cases, where it is shown to be necessary to the full enjoyment of any express power to which it was an incident; or, where the creation of a corporation was necessary to the attainment of any of the purposes, for which the United States was established. See McCulloch v. Maryland, 4 Wheat., 316 (411, 422); Fort Leavenworth Railroad Co. v. Lowe, 114 U. S., 525; Chicago & Pacific Railroad Co. v. McGlinn, id., 542; Benson v. United States, 146 U. S., 325; Luxton v. North River Bridge Co., 153 U. S., 525 (529).

in the case of the *Central Pacific Railroad Company* against *Gallatin, Mr. Justice Field,* delivering a dissenting opinion, maintained, that the legislative power of the United States could not, under the guise of regulation, either add to, or substract from the powers conferred upon corporations created by the States;* and, in the case of the *Pensacola Telegraph Company* against the *Western Union Telegraph Company,* the same learned justice also took issue with the opinion of a majority of the court, by saying, that, "were the principle otherwise, it would be utterly subversive of our system of local state government;"† and, it may be well to note, that the dissenting opinion, in the more recent case of the *Northern Securities Company,* against the *United States,* was practically based upon the same grounds.

However, whatever may have been the grounds of this difference of opinion, or the reasons upon which it is based, the doctrine has long been settled, that Congress has the power to grant to corporations created by the several States, franchises in addition to those conferred upon them by their respective charters, provided only, that the franchises so granted, be similar to those granted by the State, and which may be convenient to the business for which they were created, and endowed with their corporate powers; and provided, the establishment, encouragement or regulation of such business be within the legitimate powers of that body, under the Constitution of the United States. Hence, in the *Western Union Tele-*

*99 U. S., 700.
†96 U. S., 1.

graph case, above referred to, as well as in other cases, since determined, by the Supreme Court of the United States, the conclusion was reached, by a majority of the court, that under the power, vested in Congress, to regulate commerce, between the several States, the Act of Congress of July 24th, 1866,* entitled, "An Act to Aid the Construction of Telegraph Lines, and to secure to the Government the same for Postal, Military and other purposes," was a valid act, and was in effect, a prohibition on all state monopolies in telegraphing, and that the consent of a State, to a corporation of its own creation, seeking the privileges of the Act, was not necessary to enable it to accept its provisions;† and, in the subsequent case of the *United States* against the *Union Pacific Railroad Company, et al,*‡ the object of that Act was declared to be, "not only to promote and secure the interests of the government, but to obtain, for the benefit of the people of the entire country, every advantage, in the matter of communication by telegraph, which might come from competition between corporations of different States."

So, in considering the provisions of the National Banking Act,§ which provides for the creation of national banks, and confers certain privileges upon banks, incorporated under state laws, which enables them to become national banking associations, the United States

*94 U. S., 1; Pembina Mining Co. v. Pennsylvania, 125 U. S., 184.
†160 U. S., 1.
‡160 U. S., 1 (44).
§13 U. S. Stat., 112.

Supreme Court has declared, that the consent of the State, under whose laws such banks are incorporated, to the change provided for in the Act of Congress, is not necessary, since it was as competent for Congress to authorize the transmutation, as it is to create such an institution originally.*

And, it has also been held, that, to the extent of the powers, rights, privileges and immunities granted to state corporations, by the United States, Congress retains the right of amendment, and in that way, it may regulate the administration of the affairs of the corporation, in respect of debts, created under its authority, in any manner not inconsistent with the requirements of its original charter, as modified by subsequent acts of the state Legislature, accepting what has been done by Congress, in behalf of the corporation.† But, in the case of *Thompson* against the *Union Pacific Railroad Company*,‡ it was held, that a corporation, accepting benefits of this character, from the government of the United States, and submitting itself to certain duties, under the legislation of Congress, is no less a corporation of the State of its incorporation; and, it has also been held, that the conversion of a state bank into a national bank does not destroy its identity, nor affect its existence, as an institution of the State to which it owes its existence,§ and in other cases, the doctrine has been laid down that, the mere fact, that a corporation is organized under a

*Casey, as Receiver, etc., v. Galli, 94 U. S., 673.
†Central Pacific Railroad Co. v. Gallatin, 99 U. S., 700.
‡9 Wall., 579.
§Metropolitan National Bank v. Claggett, 141 U. S., 520.

statute of the United States, receiving therefrom the corporate power to charge and collect tolls and rates for transportation, does not remove it from the operation of a state law, establishing a Railroad Commission, as to business done wholly within the State, and that such business is subject to the control of the State in all matters of taxation, the establishment of tolls and rates and other police regulations;* and, suits, brought against a State, by a corporation created by authority of Congress, are held to be excluded from the judicial power of the United States, unless by the consent of the State, even though the subject-matter of the suit be one arising under the Constitution and laws of the federal government.†

So, notwithstanding the power of Congress to create corporations, which may be necessary to enable the federal government to carry out its constitutional authority, in any case, and, for this purpose, to confer, rights, powers and immunities upon corporations deriving their existence from the several States, the relation which that government sustains to the grant thus conferred, by Congress, does not necessarily determine the rights of the respective States, in respect to those corporations. Indeed, there are certain matters, concerning such corporations, which are governed, in the course of their dealings, far more by the laws of the States, than by those of the United States. Thus, without some special

*Reagan v. Mercantile Trust Co., 154 U. S., 413; see also Thompson v. Union Pacific Railroad Co., 9 Wall., 579; Union Pacific Railroad Co. v. Peniston, 18 id., 5.

†Smith v. Reeves, 178 U. S., 436.

regulation of Congress, respecting its own corporations, or the franchises conferred upon state corporations for federal purposes, all corporate contracts are governed and construed, by the laws of the State, in which they are made or sought to be enforced; their right to collect debts, and their liability to be sued, for the enforcement of obligations, whether sounding in contract or in tort, are based upon the laws of the several States, and the States may exercise their general power of taxation, upon all corporations doing business within their jurisdiction, notwithstanding the fact, that they owe their existence, or the enjoyment of some, or all, of their privileges to the federal government, and, it is only when the state law, upon these subjects, incapacitates such corporations from discharging their duties to the general government, that it becomes inoperative, by reason of its unconstitutionality.*

However, on account of the extent of the operation of the power of the United States, to regulate commerce among the several States, it was argued, by counsel, in the case of *Smith* against the *State of Alabama*,† that, foreign corporations (a term as applicable to corporations, created by the several States, as it is to those created by foreign nations), carrying on the business of interstate commerce cannot be excluded from a State, nor can they be required to conform to any regulation, by

*First National Bank v. Kentucky, 9 Wall., 353; McCulloch v. Maryland, 4 Wheat., 316. See also Northern Securities Co. v. United States, 193 U. S., 197.

†124 U. S., 465.

the State, in which its business is conducted, as a condition precedent to the right to carry on such business; and this contention, if not applicable to the facts, presented by the record in that case, has been approved in other cases determined by the Supreme Court of the United States, among which are to be found, the case of the *Postal Telegraph Company* against *Adams,** where it was expressly held, that "a State cannot exclude, from its limits, a corporation engaged in inter-state or foreign commerce, . . . either directly or indirectly, by the imposition of inadmissible conditions;" and, in applying this principle to the facts in the *Northern Securities case,*§ the court said, that "no State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress exerting the power it possesses under the Constitution, over inter-state and international commerce, or so as to exempt its corporations, engaged in inter-state commerce, from obedience to any rule lawfully established by Congress, for such commerce, [for] it cannot be said, that any State may give a corporation, created under its laws, authority to restrain inter-state or international commerce, against the will of the Nation, as lawfully expressed by Congress." To which it was added: "The federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred, on its

*155 U. S., 688. See also Horn Silver Mining Co. v. New York, 143 U. S., 305 (314).

†193 U. S., 197 (346).

books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But, to the end, that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out purposes of a combination formed in restraint of inter-state commerce;" and, so it has been held, that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in such commerce, or impose any burden upon it, within its limits.*

The reason of this has been declared to be, that the business of carrying on inter-state commerce, and the right to enjoy its benefits, is not a franchise or a privilege granted by the State, to any one of its corporations; but it is a right which every citizen of the United States is entitled to exercise under the Constitution, upon such conditions only as may be prescribed by federal laws; and, that the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.† But, the authority conferred, by the Act of Congress of June 15th, 1866,‡ upon railroad companies engaged in commerce among the States, whatever may be the extent of such authority, it has been

*Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S. 114 (118).
†Crutcher v. Kentucky, 141 U. S., 47 (57).
‡14 U. S. Stat., 66.

determined, does not interfere with the passage, by the several States, of laws having for their object the personal safety of passengers, while travelling within their respective limits, from one State to another in the exercise of the police power;* nor is the existence of the federal power of supervision, and the consequent obligation of the courts of the United States to protect that power from encroachment, on the part of the States, inconsistent with the power of each State to control its own internal commerce, and to tax its own corporations, nor with its power to tax foreign corporations, engaged in such commerce, on account of their property within the State.†

Generally speaking, the police power of a State is that power, in virtue of which it is enabled to regulate its own institutions, civil and municipal, and which are established, and maintained, by its political and governmental authority, for the use and convenience of its people. The term embraces its whole system of internal regulation, and includes all the means, by which it seeks not only to preserve the public order, and to punish and prevent the commission of offenses against its laws, but also, to establish, for the intercourse of all its citizens, those rules of good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each, the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of the right of others. The police

*New York, New Haven & Hartford Railroad Co. v. New York, 165 U. S., 628 (633).

†New York, Lake Erie & Western Railroad Co. v. Pennsylvania, 158 U. S., 431 (437).

power, is, therefore, said to be nothing more nor less, than the power of government, inherent in every sovereignty, to the extent of its dominions; and, whether a State enacts a quarantine law, or a law to punish offenses, or to establish courts of justice, or to provide for the recording of instruments, or to regulate commerce, within its own limits, it acts only in pursuance of that inherent and comprehensive sovereign power, which every independent State possesses, and which enables it to govern men and things within the limits of its jurisdiction. It is, therefore, that power of self-preservation, which is inherent in every well organized community, and, in virtue of which, it may legislate in all matters, which may be deemed necessary to guard its inhabitants against anything which may corrupt the morals, or endanger the health and lives of the community,* or which may be contrary to the general welfare of its people.†

This power of the several States not having been surrendered, to the federal government, by the Constitution, it follows, that its exercise, by them, extends to the enactment of all laws, the purpose of which is to prevent the introduction, within their limits of articles of trade, which on account of their unwholesome condition, would bring in, and spread disease, pestilence and death, or which would be unfit for human use or consumption;‡ it in-

*Passenger Cases, 7 How., 283 (400); Mugler v. Kansas, 123 U. S., 623 (659).

†Dent v. West Virginia, 129 U. S., 114 (122).

‡Bowman v. Chicago & Northwestern Railroad Co., 125 U. S., 465 (489). The power of the States to exclude noxious and unhealthful articles from their territory was elaborately considered by the Supreme Court of the United States, in the License Cases

cludes the power to prevent deception, fraud and injury, in the sale of articles of commerce,* and extends to the prevention of crime, and includes the power to exclude, from the limits of the State, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases,† as well as to such legislation as may tend to increase the industries of the State, develop its resources and add to its wealth and general prosperity.‡

The police power of the several States also extends to the control and regulation of all those things, which, when used in a lawful manner, are legitimate subjects of property and of commerce,§ but, which in their use, may be detrimental to the health and morals of the people, and contrary to the policy of the State; and, the power of the States, to regulate the use of such articles of commerce, embraces the right to exclude them from their territory altogether, and includes the power to enforce all legisla-

(5 How., 504), and the doctrine was announced, that this power was not in conflict with the commercial power of Congress for the reason that they were not the legitimate subjects of commerce, Mr. Justice Catron saying that, "If, from its nature," "a noxious or unwholesome article does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction," and as an incident to this power a State may use any means to ascertain the fact. See also *In re* Rahrer, 140 U. S., 545 (557).

*Plumley v. Massachusetts, 155 U. S., 461; Machine Co. v. Gage, 100 U. S., 676; Emert v. Missouri, 156 U. S., 296; Capital City Dairy Co. v. Ohio, 183 U. S., 238.

†Plumley v. Massachusetts, 155 U. S., 461 (487).

‡Brennan v. Titusville, 153 U. S., 289; Barbier v. Connolly, 113 U. S., 27.

§Leisy v. Hardin, 135 U. S., 100 (158-9), *per* Gray, J.

tion which may be, considered, directly, or indirectly, requisite, to the effectual enforcement of the power in question.* Hence, all property, within a State, whether owned by private persons, or by corporations, is held subject to the power of the State to regulate its use, in such manner as not to necessarily endanger the health, lives and personal safety of its inhabitants.†

For this reason, it is, that the legislation of the several States, relating to the regulation of the manufacture and sale of intoxicating liquors,‡ requiring the inspection of cattle, brought within a State from without,§ and for the regulation of the sale of cigarettes within its territory,¶ has always been sustained.

And, notwithstanding the announcement of the doctrine, that no State has the power to control and regulate the management and operation of corporations, created by its own authority, or by the authority of other States, where the purpose of their incorporation is the business of inter-state and foreign commerce, as already stated, the several States may still legislate concerning such corporations, where their legislation falls within the legitimate exercise of the police power; and, therefore, it has been held, that, in the exercise of this power, a State may make all needful regulations of a police character, affect-

*Hooper v. California, 155 U. S., 648 (656).

†Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U. S., 226.

‡Bartemeyer v. Iowa, 18 Wall., 129; Mugler v. Kansas, 123 U. S., 623.

§Kimmish v. Ball, 129 U. S., 217; Vance v. W. A. Vandercook Co., 169 U. S., 438; Reid v. Colorado, 187 U. S., 137.

¶Austin v. Tennessee, 179 U. S., 343.

ing the business of such corporations, while operating within its jurisdiction; and, in this way, it may require a railroad company to keep its road-way clear of noxious plants;* to fence so much of its road as lies within the State; to stop trains at railroad-crossings;† to slacken speed, while running in crowded thoroughfares; to fix its rates of transportation,‡ and to post its tariffs and time-tables, at proper places; to determine the number of passenger trains to be run over its lines daily,§ and to prohibit the running of trains on the Sabbath day;¶ to set apart coaches for different classes of passengers carried over its road;‖ to determine the method of heating its passenger cars;** to establish stations, at villages and

*Missouri, Kansas & Texas Railway Co. v. May, 194 U. S., 267

†Cleveland, Cincinnati & St. Louis Railroad Co. v. Illinois, 177 U. S., 514. However, in the case cited, it was held, that, while the State may enact laws requiring the stoppage of trains, at certain stations, for local accommodation, "after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and [is] an infringement upon that provision of the Constitution, which requires . . . that commerce between the States shall be free and unobstructed."

‡Crutcher v. Kentucky, 141 U. S., 47; Erb v. Morasch, 177 U. S., 584.

§Stone v. Farmers' Loan & Trust Co., 116 U. S., 307; Chicago & Northwestern Railroad Co. v. Fuller, 17 Wall., 560.

¶Lake Shore & Michigan Southern Railway Co. v. Ohio, 173 U. S., 285.

‖Hennington v. Georgia, 163 U. S., 299.

**Plessy v. Ferguson, 163 U. S., 537; United States v. Perkins id., 625; Chesapeake & Ohio Railroad Co., v. Kentucky, 179 U. S., 388.

boroughs on its line,* and to compel telegraph companies operating, wholly or partly in the State, to receive, transmit and deliver messages with due diligence upon the payment of the usual charges;† and to do other things, of a kindred character, affecting the comfort, convenience or safety of those who are entitled to look to the State for protection against the wrongful and negligent conduct of others, although such corporations, may be engaged in the business of foreign or iner-state transportation.‡

Therefore, a corporation, created, by state authority, for the purpose of, and engaged in the business of common carriage, extending from one State to another, or into a foreign country, is not relieved from state control, simply because, it has been incorporated by, and is carrying on the business of foreign and inter-state commerce, in such other States or countries, through which its road runs, the reason of which is declared to be, that "persons travelling on inter-state trains are as much entitled, while within the State, to its protection, as those who travel on domestic trains,"§ and railroad corporations are subject to such legislative control, by the States, as may be necessary to protect the public against danger, injustice and oppression.¶

*New York, New Haven & Hartford Railroad Co. v. New York, 165 U. S., 628.

†Minneapolis & St. Louis Railroad Co. v. Minnesota, etc., 193 U. S., 53.

‡Western Union Telegraph Co. v. James, 162 U. S., 650.

§New York & New England Railroad Co. v. Bristol, 151 U. S,, 556.

¶New York, New Haven & Hartford Railroad Co. v. New York, 165 U. S., 628 (632).

The general principle, through the application of which these results have been reached, is well illustrated, in the case of the *Chicago & Northwestern Railroad Company* against *Fuller*,* where the question of the power of a State to regulate the fares to be charged by the plaintiff in error, upon its business of transportation was directly in issue, and in which counsel took the position, that, if the power to regulate commerce among the several States be vested exclusively in Congress; and, if the carrying of passengers and freight, from one State to another, for hire and compensation, be commerce, then, it must necessarily follow, that a State cannot, in any manner, regulate the hire and compensation of such carriage, nor can it restrict the carriage of goods and persons, and, it was urged, that a State cannot do, indirectly, that which it has no power to do directly. But, in disposing of this argument, the Supreme Court of the United States held, that the statute of the State of Illinois, the constitutionality of which was attacked, and which required, that each railroad company in the State should, at stated periods, fix its rates, for the transportation of passengers and freight, and cause a copy to be posted, was not an unreasonable exercise of the police power of the State, nor was it unconstitutional, as being in conflict with the commercial power of Congress; and, it was likewise held, that the statute in question was not a regulation of commerce, within the meaning of the Constitution—it being merely a police regulation within the power of the State to prescribe.

*17 Wall., 560.

So, in the case of *Peik* against the *Chicago & Northwestern Railroad Company*,* it was contended, that even where the policy of the law of a State declares, that the compensation charged, by common carriers, for the carriages of persons and property, should be reasonable, the question as to what is reasonable is for the courts to determine, and not for the Legislature. Upon this contention, however, it was determined, that where, in any case, property is clothed with a public interest, it is competent for the Legislature to fix the limit to that, which shall, in law, be a reasonable compensation for its use; that the limit, so fixed, is binding upon the courts, as well as upon the public authorities of the States, and, that if such limit be improperly fixed, the Legislature and not the courts must be appealed to for a change.

Therefore, without some limitation, upon this power of the several States, contained in the Constitution of the United States, the power to fix the rate of compensation to be charged, by common carriers, for the carriage of persons and freights, or for the use of any property dedicated to a public use, and clothed with a public interest, falls within the legitimate operation of the police power of the several States. And, being a matter resting entirely within the discretion of the state Legislatures, it has been held, that, any security, which the individual or the public may have, against its abuse, must rest alone in the responsibility of those, who, for the time being, are vested with the exercise of the power, and, that the

*94 U. S., 164. See also, Chicago & Northwestern Railroad Co. v. Ackley, id., 179.

courts will never presume that their discretion has been, or will be exercised detrimentally to the public interest of the State, nor to the rights of its citizens, or other inhabitants, who are entitled to the equal protection of its laws.*

Whatever may be the extent of their operation, these principles have never been questioned, in so far, at least, as the highways of the State are concerned, whether they be constructed, maintained and operated, by the State itself, or by individuals or corporations, under its authority; but, *Mr. Justice Field,* in the case of *Munn* against the *State of Illinois,*† expressed a very serious doubt, as to the power of the State to regulate the compensation of commercial agencies, which did not derive the franchise of transacting their business from the State, upon the theory, that it is only when some right or privilege is conferred, by the legislative authority of the State, upon the owner, which he may use in connection with his property, and, by means of which, the use of his property is rendered more valuable, or through which he enjoys advantages over others, that the compensation to be received by him, becomes the legitimate subject of state regulation; for, "submission to the regulation of compensation, in such cases," he observes, "is an implied condition of the grant, and the State, in exercising its power of prescribing the compensation, only determines the conditions upon which its concessions shall be enjoyed;" and, "when the privilege ends, the power of regu-

*Baltimore & Ohio Railroad Co. v. Maryland, 21 Wall., 456.
†94 U. S., 113.

lation ceases." This argument, however, did not receive the approval of a majority of the Court, in that case, and the result of its decision was the establishment of the doctrine, that, the power of the several States to reglate the compensation of individuals and corporations, charged by them, for a public service, extends, not only to the operation of the highways of the State, but also to all the agencies of commerce, the property and business of which are clothed with a public interest, such as warehouses, elevators and wharfs, whether such property be acquired or such business be conducted, under a franchise, emanating directly from the State, or not.

And, such has always been held to be the sovereign nature of the police power of the several States, it may be added, that they have no constitutional right to barter away this power, and, by contract, limit its exercise to the prejudice of the public health and morals;* and, one injured by the exercise of the power, in his property or personal rights, has no protection, either under the provision of the Constitution of the United States, which inhibits the States from passing any law, impairing the obligation of contracts,† or under the terms of the Fourteenth Amendment of that instrument;‡ and, in its ap-

*Powell v. Pennsylvania, 127 U. S., 687. While the police power of the State is inalienable, it may for local purposes, be delegated to a municipal corporation, and the principle is well settled, that any alleged surrender or suspension of a power of government, respecting any matter of public concern, must be shown by clear and unequivocal language. Fisher v. St. Louis, 194 U. S., 361; Belmont Bridge v. Wheeling Bridge, 138 U. S., 287.

†Fisher v. St. Louis, 149 U. S., 361.

‡Bartemeyer v. Iowa, 18 Wall., 129; Barbier v. Connolly, 113 U. S., 27; Mugler v. Kansas, 123 U. S., 623.

plication to intoxicating liquors, it has been declared that, as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of such liquors, is not repugnant to any clause of the Constitution,* since the grant to Congress, of authority to regulate commerce, did not involve a surrender of the police power of the States.†

The nature of the police power of the States, as well as the extent of its operation, was briefly defined and stated, by *Mr. Chief Justice Fuller,* in the case of *United States* against the *E. C. Knight Company,* when he said, that it "is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and [is, therefore], essentially exclusive;"‡ to which *Mr. Justice Harlan,* in the case of the *Missouri, Kansas & Texas Railway Company* against *Haber.*§ has added, that "This court, while sustaining the power of Congress to regulate commerce among the States, has steadily adhered to the principle, that the States possess, because they have not surrendered it, the power to protect the public health, the public morals and the public safety, by any legislation appropriate to that end, which does not encroach upon the rights guaranteed by the National Constitution, nor

*Beer Co. v. Massachusetts, 97 U. S., 25 (33); Mugler v. Kansas, 125 U. S., 623 (659).

†New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; Plumley v. Massachusetts, 155 U. S., 461 (471).

‡156 U. S., 1 (111); see also, *In re* Rabner, 140 U. S., 545 (554).

§169 U. S., 613 (628).

come in conflict with Acts of Congress passed in pursuance of that instrument."

While these principles are well established, they are, and must always be subject to the limitations, growing out of the commercial power of the federal government; and although the States may regulate the operations of individuals and corporations engaged in the business of transportation, and other commercial pursuits, in the exercise of the police power, in all things, which have not been placed, by the Constitution of the United States, within the exclusive jurisdiction of Congress, it is a well-established doctrine, that nothing can be done by the state governments, in the exercise of this power, which will operate as a burden upon foreign or inter-state commerce, or impair the usefulness of its facilities; and, while Congress has no power to interfere with the police regulations of a State, relating exclusively to its internal or domestic trade,* the State can do no act, in the exercise of its police power, which would, in effect, be a regulation of, or amount to a burden upon foreign or inter-state commerce. Hence, it has been held, that where the necessary result of enforcing the provisions of a state law, prohibiting a higher rate, for the transportation of merchandise, for a short haul, than for a long haul, although operating only on transportation of articles wholly within the State, may be to limit or prohibit their transportation from a point without the

*Covington & Cincinnati Bridge Co., v. Kentucky, 154 U. S., 204 (210), citing United States v. De Witt, 9 Wall., 41; Patterson v. Kentucky, 97 U. S., 501.

State to a point within, or from a point within, to a point without, inter-state commerce is thereby affected, and may be regulated, to that extent, since, in that event, the effect of the law would be direct and important, and not merely incidental, and, in such case, it has been held, that the regulation is unconstitutional, under the operation of the commercial clause of the Constitution.* So, in the

*Louisville & Nashville Railroad Co. v. Eubank, 184 U. S., 27 (36); see also, Wabash, St. Louis & Pacific Railroad Co., v. Illinois, 118 U. S., 557. In the Eubank case, above cited, the ruling of the Supreme Court of the United States, upon which its decision was based, involved a construction of a statute of the State of Kentucky, which did not undertake to establish any specific rate upon interstate travel, but only provided that passengers shall be charged no higher rate for local fares, than those which had been fixed, on interstate traffic. The contention was, to the effect, that since Congress had acted upon the subject, in the enactment of the Interstate Commerce Act, the State had no power to prescribe any rate whatever, even though that rate was the same as that fixed by Congress, or, by the Commission, under the Act, and this view was accepted by a majority of the court; but its correctness was challenged by Mr. Justice Brewer, in a dissenting opinion, delivered by him, his argument being based upon considerations involved in the *quaere,* as to whether it is "interfering with interstate commerce, when the State, not prescribing the charges for interstate travel, simply requires, that passengers shall be charged no higher rate for local travel?" In the course of his argument he said:—"The form in which the State legislation is cast cannot be vital in determining the question of power. If an act, which in terms prescribes a rate per mile, for travel, the same as has been prescribed by Congress, for interstate travel, is within the powers of the State (and that it is, cannot be doubted), surely one accomplishing the same thing, by simply forbidding the carrier to charge more for a short haul than for a long haul is likewise within its power. The State is merely using the standard fixed by Congress, and enforcing that standard in respect of local rates (Miller's Executors v. Swann, 150 U. S., 132); and, if a State may select as a standard the interstate rates prescribed by Congress, and make local rates the same, without interfering with interstate commerce, it would certainly seem, that it would in like manner take the inter-

application of the same rule, it has been held, that a State Railroad Commission, has no power to fix and enforce rates for transportation, between points within the State and points without in any event.* And, such is the public nature of the business of corporations, engaged in foreign and inter-state transportation, that the State's power to establish rates, for such transportation, cannot be exercised so as to require them to carry persons and property without reward, for this would be not only a burden upon commerce, but it would amount to the taking of private property without just compensation, and without due process of law.†

Therefore, in those cases, where the regulation of rates, on inter-state commerce has been upheld, as being admittingly within the scope of the legitimate exercise of the police power of the States, it has been so, only by reason of the absence of congressional action on the same sub-

state rate which the carrier himself prescribes, and compel conformity of local rates thereto, and still not be subject to the charge of interfering with interstate commerce. It is strange to be told, that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the State respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier, in pursuit of its own financial interest overturns the Constitution and statute of a State, when like action by Congress, in the exercise of its constitutional power does not" (pp. 44, 45).

*Handley v. Kansas City Southern Railway Co., 187 U. S., 617.

†Smith v. Ames, *etc.*, 169 U. S., 466 (523); see also, Railroad Commission Cases, 116 U. S., 307 (325, 331); Dow v. Beidleman, 125 U. S., 680 (689); Georgia Railroad & Banking Co., v. Smith, 128 U. S., 174 (179); Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U. S., 418 (458); Chicago & Grand Trunk Railway Co. v. Wellman, 143 U. S., 339 (344); Budd v. New York, 143 U. S., 517 (647); Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362 (399).

ject, and in these cases, it has also been held, that when Congress has acted, under its constitutional power to regulate commerce, and the subject-matter of its legislation has been covered by such action, the law of the States must give way to the paramount authority of the federal government, although the subject of such legislation be within the scope of the police power of the States;* but, from this, it does not necessarily follow, that the Act of Congress establishing the Inter-state Commerce Commission has this effect, since it has been held, that that Act confers upon the Commission no power to fix the rates charged by corporations engaged in the business of transportation, and that, subject to the prohibition, that their charges shall not unjustly discriminate, so as to give undue preference or advantage, to persons or traffic similarly situated, it leaves the subject as it was at the common law.†

Concerning the police power, it has been said, that, in the progress of civilization, population and wealth, new and vicious indulgences spring up, which require re-

*Gulf, Colorado & Santa Fé Railway Co., v. Hefley, 158 U. S., 98; see also, Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Cooley v. Board of Wardens, 12 How., 299; Pennsylvania v. Wheeling & Belmont Bridge, 18 id., 421; The James Gray v. The John Fraser, 21 id., 184; Gilman v. Philadelphia, 3 Wall., 713; *Ex parte* McNiel, 13 id., 236; Pound v. Turck, 95 U. S., 459; Hall v. De Cuir, id., 485; County of Mobile v. Kimball, 102 U. S., 691; Ohio River Packet Co. v. Catletsburg, 105, U. S., 559; Parkersburg & Ohio River Transportation Co. v. Parkersburg, 107 U. S., 691; Escanaba & Lake Michigan Transportation Co. v. Chicago, 107 U. S., 678; Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S., 455.

†Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Railway Co., 167 U. S., 479 (493); Interstate Commerce Commission v. Alabama Midland Railway Co., 168 U. S., 144 (162).

straints, and which can only be imposed by the legislative power of the several States; that when the power shall be exerted, how far it may be carried, and where it shall cease, are questions, the solution of which must necessarily depend upon the evil to be corrected, and that it must always be exercised under the changing exigencies of society. Therefore, when it is said, that the police power of the States must yield to the higher power of Congress, nothing more is to be intended, than that, in the exercise of its power, upon any subject, Congress cannot assume, to itself, any authority belonging to the States, but only that the States may not transcend its own power of self-preservation, and under the pretense of a police regulation, counteract, or trench upon, the commercial power of Congress.*

In view of the distinctive nature of both these powers, therefore, the full scope of the operation of the police power of the States, is not susceptible of exact, or well-defined limitations; but, the generally accepted opinion has always been, that the whole question of the relation of the police power of the States and of the commercial power of Congress to each other must be determined, by a consideration of the fact, as to whether the legislation of the States, enacted in pursuance of their police power, operates upon subjects over which they have no authority to legislate whatever, or whether there be, as a result of such legislation, an actual conflict between the law of the States and a statute of Congress, enacted upon the same subject. In either case, the state law must give way,

*See License Cases, 5 How., 504 (592).

because, within the scope of its constitutional authority, whatever may be the power under which it is asserted, the action of Congress is supreme and paramount to that of any of the several States of the Union.*

The power of taxation, like the police power,† is an inherent power of sovereignty, which, from its very nature is incident to all forms of government, whether monarchical or republican, or national or municipal, and, in the United States, it is said to be as vital to the existence of the States as it is to the existence of the federal government.

This power, on the part of the several States, is, therefore, wholly independent of the commercial power of Congress, and a state tax, imposed upon property, within its jurisdiction, can never be open to constitutional objection, even though it may affect commerce, because in imposing the tax the States are not doing what Congress is empowered to do.‡

But, since taxation may be a means of commercial regulation,§ the power to accomplish which, in so far as

*See Gibbons v. Ogden, 9 Wheat., 1 (195); Brown v. Maryland, 12 id., 419; Worcester v. Georgia, 6 Pet., 515; License Cases, 5 How., 504 (579); Mayor, *etc.*, of New York v. Miln, 11 Pet., 102 (145).

†In the case of Kidd vs. Pearson, (128 U. S., 1), it was said, that the taxing power of the States is as broad as their police power, and, that all property, within their respective jurisdictions, is subject to the operation of the one, so long as it falls within the restrictive regulations of the other.

‡Philadelphia & Reading Railroad Co. v. Pennsylvania, 15 Wall., 232.

§Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S., 192; New York, Lake Erie & Western Railroad Co. v. Pennsylvania, 158 U. S., 431.

foreign, inter-state and Indian commerce is concerned, is expressly vested in the legislative department of the federal government, it necessarily follows, that when the purpose or effect of a tax, levied by a State, amounts to a regulation of that commerce, and comes in direct conflict with the federal power, it is unconstitutional, and, therefore, cannot be sustained. For this reason, it has often been declared, that "no State has the right to lay a tax on inter-state commerce, in any form, whether by way of duties laid on the transportation of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on," since it is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress and not to the States.*

Therefore, it has been held, that any property which constitutes the subject of inter-state commerce, while in transit;† or any person passing through a State, or com-

*Leloup v. Port of Mobile, 127 U. S., 640 (648); Asher v. Texas, 128 U. S., 129; Lyng v. Michigan, 135 U. S., 161; see also, Philadelphia & Reading Railroad Co., v. Pennsylvania, 15 Wall., 232; Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S., 1; County of Mobile v. Kimball, 102 U. S., 691; Western Union Telegraph Co., v. Texas, 105 U. S., 460; Moran v. New Orleans, 112 U. S., 69; Western Union Telegraph Co. v. Pennsylvania, 128 U. S., 39; Robbins v. Shelby County Taxing District, 120 U. S., 489; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196; Brown v. Houston, id., 622; Walling v. Michigan, 116 U. S., 446; Pickard v. Pullman Southern Car Co., 117 U. S., 34; Wabash, St. Louis & Pacific Railroad Co. v. Illinois, 118 U. S., 557; Philadelphia & Southern Steamship Co., v. Pennsylvania, 122 U. S., 326; Ratterman v. Western Union Telegraph Co., 127 U. S., 411.

†Kelley v. Rhoads, 188 U. S., 1; see also, Blackstone v. Miller, id., 189.

ing into it, for temporary purposes;* or the business of soliciting freights, for inter-state transportation;† or for the sale of property, for non-resident owners, for shipment to persons, within the State, where the sale is made;‡ or an auctioneer's license, for the sale of imported goods, in original packages,§ is exempt from state taxation; and that the same rule applies, whether the persons engaged in such business, be a resident or a non-resident of the State, levying the tax, or not.¶

Notwithstanding this restriction upon the exercise of the taxing power, on the part of the several States, however, the fact has always been recognized, that there is nothing in the federal Constitution, which forbids a State from taxing the business of its citizens, and all property, which may come within its jurisdiction, irrespective of its nature or the purposes for which it may be employed,|| provided, nevertheless, that in its operation, the power be not allowed to interfere with any of the rights

*Bowman v. Chicago & Northwestern Railroad Co., 125 U. S., 465 (497).

†McCall v. California, 136 U. S., 105.

‡Stoutenburgh v. Hennik, 129 U. S., 141; Stockard v. Morgan, 185 U. S., 27. In the case of Stoutenburgh *vs.* Hennick, above cited, the question was directly raised as to whether the commercial power of Congress extended to the District of Columbia, and while the question was answered in the affirmative by a majority of the court, Mr. Justice Milber, dissented from its conclusion, upon the ground, that, inasmuch as the District of Columbia was neither a State nor a foreign nation, its commerce could not fall within the operation of this power.

§Cook v. Pennsylvania, 97 U. S., 566; Leisy v. Hardin, 135 U. S., 100 (120).

¶Stockard v. Morgan, 185 U. S., 27.

||Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18.

and powers of the national government, or with individuals or corporations enjoing privileges and exercising franchises guaranteed to them, by the Constitution of the United States, or conferred upon them by a valid Act of Congress.*

This principle is well illustrated, in the case of *Ficklen* against the *Shelby County Taxing District,*† where *Mr. Chief Justice Fuller,* delivering the opinion of the Supreme Court of the United States, said:—"No doubt can be entertained of the right of a state Legislature to tax trades, professions and occupations, . . . and where a resident citizen engages in general business, subject to a particular tax, the fact, that the business done chances to consist, for the time being, wholly or partially, in regulating sales, between resident and non-resident merchants, of goods, situate in another State, does not necessarily involve taxation of inter-state commerce, forbidden by the Constitution"; and, therefore, "it is a well settled principle, that a State has power to tax all property, having a *situs* within its limits, whether employed in inter-state commerce, or not." Hence it has been held, that although no State has the power to interfere with the operations

*Western Union Telegraph Co. v. Taggart, 163 U. S., 1 (14), citing Delaware Railroad Tax Cases, 18 Wall., 206 (232); Western Union Telegraph Co. v. Texas, 105 U. S., 460 (464); Western Union Telegraph Co. v. Massachusetts, 125 U. S., 530; Marye v. Baltimore & Ohio Railroad Co., 127 U. S., 117 (123-4); Leloup v. Port of Mobile, 127 U. S., 640 (649); Pulman's Palace Car Co. v. Pennsylvania, 141 U. S., 18; Pittsburg, Cincinnati, Chicago & St. Louis Railroad Co. v. Backus, 154 U. S., 421 (445).

†145 U. S., 1 (22-23), citing Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.

of inter-state or foreign commerce, by the imposition of a tax, which, in effect, is a license exacted, for the privilege of transacting the business of such commerce, within the State, yet, this restriction does not abridge the right of the State, to tax, at their fair value, the subject-matter of commerce, or the means and instrumentalities, through which it is carried on.*

This doctrine is as applicable to the business and property of corporations employed in foreign and inter-state commerce, as it is to the business and property of individuals engaged in like pursuits; and, when a corporation of one of the States brings into another State a portion of its movable property, for use and employment there, it is well settled, that it is subject to the power of that State to impose, upon such property, its fair share of the burdens of taxation, in the same manner as the State taxes similar property, employed for like purposes, by its own corporations, although such property may be the subject of, or employed in the business of foreign or inter-state commerce.†

The exercise of the taxing power of the States, in such cases, however, is not justified, and can never be sustained, upon the ground, that the business, or the property, taxed, is commercial in its nature, or that it is employed in trade; but, because it is within their territorial

*Adams Express Co. v. Ohio, 166 U. S., 185.

†Union Refrigerator Co. v. Lynch, 177 U. S., 149. See also American Refrigerator Transit Co. v. Hall, 174 U. S., 70; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18; Adams Express Co. v. Ohio, 165 U. S., 194; Adams Express Co. v. Ohio, 166 U. S., 185.

jurisdiction, and, because there is no necessary repugnance between the federal power of commercial regulations and the taxing power of the States.*

Therefore, while foreign or inter-state commerce cannot, in the exercise of the taxing power, be regulated by a State, it is nevertheless true, that whenever the subjects, upon which the tax is intended to operate, may be separated, so that that part of the proceeds, which arises from foreign and inter-state commerce can be distinguished from that which arises from the internal or domestic commerce of the State, levying the tax, the distinction, between the two will be acted upon, and the tax will always be upheld, so far as it relates to such domestic commerce;† and, in according with this distinction, it has been held, that the taxation of a bridge, under a municipal ordinance, passed in pursuance of the legislative authority of the State, in which it is located, is not a regulation of commerce, although it may be used in that commerce, the power to regulate which is vested in the federal government,‡ and, if the structure crosses a navigable river, between two States,§ it is not, by reason of being an instrument of inter-state commerce, exempt

*See Ficklen v. Shelby County Taxing District, 145 U. S., 1 (23).

†Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S., 192; see also Ratterman v. Western Union Telegraph Co., 127 U. S., 411 (424).

‡Henderson Bridge Co. v. Henderson City, 141 U. S., 679 (689).

§Pittsburg, Cincinnati, Chicago & St. Louis Railroad Co. v. Board of Public Works, 172 U. S., 32.

from taxation, by either State, upon that part, which is within their respective limits and jurisdiction. So, a tax imposed "on each sleeping and parlor car company, carrying passengers from one point to another, within the State," is not in contravention of the commercial clause of the Constitution of the United States, although the company, upon which the tax is levied, be a foreign corporation, and all its cars be carried into the State from another, or *vice versa*;* and, upon the same principle, it has been held, that distilled spirits, stored in a bonded-warehouse, may be taxed, by the State in which they are stored, and the warehouseman may be required to pay a tax, upon such property, notwithstanding a federal statute, under which they are permitted to be stored, allows them to remain in bond, and be subject to negotiable receipts, while in storage.†

Although the shipment of merchandise from foreign countries, and from one State to another, as well as the act of selling it, either before or after shipment, has been held to be commerce, within the meaning of that term, as used in the Constitution of the United States, and, is, therefore, subject to the regulating power of Congress, and although it was early held, that such merchandise, imported, into a State, from abroad, was exempt from State taxation, before it became intermingled with the common mass of property within that State, on the ground, that import duties, paid to the federal government, implies the right to sell, while such merchandise

*Cummings v. Chicago, 188 U. S., 410 (421).
†Carstairs v. Cochran, 193 U. S., 10.

remains in the original package,* the question has often been raised, as to what constitutes an original package; when it becomes intermingled with the property of the State, so as to be subject to its taxation, and, whether the doctrine has any application to the "importation" of merchandise, into one State, from another.

Thus, in the case of *Austin* against the *State of Tennessee,*† an original package was defined to be such as is used in *bona fide* transactions, carried on between manufacturers and wholesale dealers, residing in different States, and consequently, in that case, it was held, that, if the size of the package was such as to indicate, that it was prepared for the purpose of evading the laws of a State, into which it is sent, it will not be protected, as an original package, against the police power of the State; and again, in the case of *May* against the *City of New Orleans,*‡ it was held, that an original package is a box, or case, in which goods are shipped from one place to another, and, that when it is opened for sale, or delivery of the several parcels of which the box or case is made up, each parcel loses its distinctive character, as an original package, and, although it may be an article of importation, it then becomes subject to taxation, by the States, as other like property within its limits.

In considering the application of the doctrine, laid down in the case of *Brown* against the *State of Maryland,* to goods shipped from one State to another, it was

*Brown v. Maryland, 12 Wheat., 419.
†179 U. S., 343.
‡178 U. S., 496 (508-9).

held by the Supreme Court of the United States, in the very recent case of the *Norfolk & Western Railroad Company* against *Sims*,* that a State has no power to tax directly, by license, upon the importer, goods imported from foreign countries, *or from other States,* while in the original packages, or before they have become intermingled with the general property, within the State, and have lost their distinctive character, as imports; upon the other hand, however, in the case of the *American Steel & Wire Company* against *Speed*,† it was said, that, in a constitutional sense, "imports" embrace only goods brought from a foreign country, and, that they do not include merchandise shipped from one State to another, and, for this reason, the several States are not controlled, as to such merchandise, by the constitutional prohibitions against taxation of imports, and, therefore, it was held, that goods, brought in original packages, from one State, and delivered in another, are, while there, subject to the laws of the State, in which they are to be sold, and, they may be taxed, by the State, without violating the commercial clause of the Constitution, although, at the time, they were stored, at a distributing point, from which they are to be afterward delivered, in the same packages, through the storage company, to purchasers in other States.

Whatever may be the effect of these decisions, as to the time when merchandise imported into a State, either from foreign countries, or from one State to another,

*191 U. S., 441.
†192 U. S., 500.

and when it becomes intermingled with the common mass of property within a State, they have not been uniform, upon the question, as to when it becomes subject to the taxing power of the States.

Thus, while in the case of *Rhodes* against the *State of Iowa,** it was held, that an article of commerce does not become intermingled with the mass of property, within a State, to which it is consigned, until actually sold, in other cases, a different result seems to have been reached, by the Supreme Court of the United States, in holding, that, although the payment of duties, imposed by the United States, on imports, undoubtedly gives the importer the right to bring his goods into this country, for sale, he does not, by simply paying the duty, escape state taxation, upon such goods, after they have reached their destination, for use or trade, and the box, case or bail, containing them, has been open and exposed for sale;† and, that, whenever such goods have reached their destination, and have been exposed for sale, by the consignee, they cease to be subject to the regulating power of Congress, under the commercial clause of the Constitution, and, therefore, become subject to taxation, like other property within the jurisdictional limits of the State.‡

The principles, upon which the taxing power is based, and under which its exercise is justified, not only apply to merchandise, which constitutes the subject-matter of foreign and inter-state commerce, but also to the means

*170 U. S., 412 (419).
†May v. New Orleans, 178 U. S., 496 (507).
‡Pittsubrg & Southern Coal Co. v. Bates, 156 U. S., 577.

and instrumentalities, through which it is bought, sold and transported from place to place. Therefore, all property, within a State, whether it be the subject-matter of foreign and inter-state commerce, or whether it be the means or instrument through which that commerce is carried on, falls within the operation of the taxing power of the several States, so long as they remain, within their respective jurisdictions, and are subject to its laws;* and, in so far as the instrumentalities of commerce are concerned, this power of the States extends to individuals as well as to corporations, whether resident or non-resident, in the one case, or domestic or foreign, in the other.† And, for the same reason, the exercise of the taxing power of the State does not depend upon the solution of the question, as to whether a corporation, subject to its operation, derives its franchise from an Act of Congress, or whether its property be acquired for the purpose of accomplishing some or any one of the functions of the federal government.‡

And, notwithstanding the doctrine, already referred to, that no State may impose conditions upon corporations, created for federal purposes, or, upon those whose operations are conducted under franchises derived from the Constitution of the United States, it is nevertheless true, that such corporations are not entitled to exemption from the ordinary burdens of taxation, imposed by a State,

*Postal Telegraph Co. v. Adams, 155 U. S., 688 (696).

†New York, Lake Erie & Western Railroad Co. v. Pennsylvania, 158 U. S., 431 (438).

‡Henderson Bridge Co. v. Henderson City, 173 U. S., 592; American Refrigerator Transit Co. v. Hall, 174 U. S., 70.

within whose borders, their property is located or in which they exercise their corporate franchises and conduct their business operations.*

This statement, however, is subject to the limitations, that in order to be constitutional, any tax imposed by a State, upon the business and property of individuals and corporations, engaged in inter-state and foreign commerce, must be levied upon such business and property, as may be transacted and located within its immediate jurisdiction;† that, whenever inter-state and foreign commerce is affected by the tax, it must be upon the property and business alone, and not upon the privilege of engaging in such business;‡ for such a tax can, in no

*Western Union Telegraph Co. v. Massachusetts, 125 U. S., 530; Ficklen v. Shelby County Taxing District, 145 U. S., 1 (22); Smith v. Ames, 169 U. S., 466; Western Union Telegraph Co. v. Missouri, 190 U. S., 412; see also Thompson v. Union Pacific Railroad Co., 9 Wall., 579; Union Pacific Railroad Co. v. Peniston, 18 Wall., 5; Reagan v. Mercantile Trust Co., 154 U. S., 413 (416).

†Crutchor v. Kentucky, 141 U. S., 47 (59); American Express Co. v. Indiana, 165 U. S., 255. In dissenting from the conclusions of the Court, in the case of Adams Express Co. *vs.* Ohio (166 U. S., 185), sustaining the method of taxation, adopted by that State, against the plaintiff in error, by an apportionment of the value of is property, situated in the State and elsewhere, Mr. Justice White s: "It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory, and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conception of government."

‡Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18 (23); Central Pacific Railroad Co. v. Calaghan, 161 U. S., 91; Southern Pacific Railroad Co. v. California, id., 167; New Mexico v. United States Trust Co., 174 U. S., 545; Keokuk & Hamilton Bridge Co. v. Illnois, 175 U. S., 626; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S., 160.

case, impose a burden upon inter-state and foreign commerce,* and in no event can the tax operate upon property and business, outside the jurisdictional limits of the State levying the tax, and belonging to persons domiciled elsewhere.† Therefore, under these well defined limitations, in order to render a State tax upon the property and business of individuals and corporations, engaged in inter-state and foreign commerce, constitutional, it must be shown, that the tax is laid upon such property and business, and not upon commerce itself, nor upon the privilege of carrying it on.‡

But, it has sometimes been held, that no State may tax a franchise conferred, upon a corporation or an individual, by the federal government, or when their property is acquired and their business is conducted, in virtue of some federal right, guaranteed by the Constitution of the United States, upon the theory, that they emanate from, and are a portion of the sovereign power of the government which confers it upon the grantees, and, therefore, to tax them, is not only in derogation of the dignity, but also subversive of the powers of the government itself, and, in either case, would be repugnant to its paramount authority.§

*Allen v. Pullman's Palace Car Co., 191 U. S., 171.

†Fargo v. Hart, 193 U. S., 490.

‡Henderson Bridge Co. v. Henderson Bridge Co., 173 U. S., 592; see also Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S., 204 (212); Henderson Bridge Co. v. Henderson City, 141 U. S., 679 (689); Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Board of Public Works, 172 U. S., 32; Thompson v. Union Pacific Railroad Co., 9 Wall., 579.

§California v. Central Pacific Railroad Co., *et al.*, 127 U. S., 1 (41).

Hence, it is said, that a telegraph company, upon complying with the provisions of the Act of Congress of July, 24th, 1866, is not liable to a State tax, except in respect of messages, transmitted wholly within the State, imposing the tax;* and, that such a company is not liable to a state tax, upon messages and receipts from their transmission, from points within the State to points without, or from points without to points within the State.† So, the franchises of a corporation created, by Congress, for federal purposes may not be taxed, by a State, without the consent of that body,‡ although, where the franchise may be separated from the property of the corporation, it may be taxed like other property, within the State, and such tax will be upheld.§

*Western Union Telegraph Co. v. Texas, 105 U. S., 460; Ratterman v. Western Union Telegraph Co., 127 U. S., 411; Western Union Telegraph Co. v. Pennsylvania, 128 U. S., 39.

†Western Union Telegraph Co. v. Alabama, 132 U. S., 472, citing Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S., 1; Western Union Telegraph Co. v. Texas, 105 U. S., 460; Fargo v. Michigan, 121 U. S., 230; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S., 326; Western Union Telegraph Co. v. Massachusetts, 125 U. S., 530; Ratterman v. Western Union Telegraph Co., 127 U. S., 411; Leloup v. Port of Mobile, id., 640. The principle stated in the text, however, applies only to the inter-state business of such corporations, and, therefore, a city ordinance improving a tax upon a telegraph company, which has accepted the benefits of the provisions of the Act of Congress of 1866, on business done "exclusively" within the city limits, has been held to be constitutional. Postal Telegraph Co. v. Char' ton, 153 U. S., 692.

‡Talbott v. Silver Bow County, 139 U. S., 438; Owensboro National Bank v. Owensboro, 173 U. S., 664.

§United States v. Perkins, 163 U. S., 625; Third National Bank of Louisville v. Stone, 174 U. S., 432; Louisville v. Third National Bank, id., 435; Louisville v. National Bank, *etc.*, id., 436; First National Bank of Louisville v. Louisville, *etc.*, id., 438.

Therefore, whenever the power of the State to tax the property and business of individuals and corporations, engaged in inter-state commerce, is ascertained, or conceded to exist, any mode of levying and collecting the tax, which the state Legislature may adopt, will be upheld.* The amount of the tax may, therefore, be apportioned to the amount of sales of merchandise, made within the State;† it may take the form of a tax upon the privilege of doing business there, provided always, that the assessment be based upon the value of the property and business, affected by the tax, and that it do not amount to a condition precedent to the right to carry on the business of foreign or inter-state commerce.‡

So, the gross receipts of a common carrier corporation, engaged in the business of inter-state commerce, may be taken into consideration, in determining the amount of a tax to be laid, upon its business within the State levying the tax;§ and, what the amount of the tax shall be may be properly ascertained, by an apportionment of the number of miles operated in the State to the entire length of its road, within and without the State,¶ and

*Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S., 192 (200).

†Illinois Central Railroad Co. v. Illinois, 146 U. S., 387; Illinois v. Illinois Central Railroad Co., 184 U. S., 77; Clark v. Titusville, id., 329.

‡Postal Telegraph Co. v. Adams, 155 U. S., 688 (696).

§Maine v. Grand Trunk Railroad Co., 142 U. S., 217 (228); Home Insurance Co. v. New York, 134 U. S., 594.

¶Charlotte, Columbia & Augusta Railroad Co. v. Gibbes, 142 U. S., 386 (394); Barbier v. Connolly, 113 U. S., 27; Soon Hing v. Crowley, id., 703; Missouri Pacific Railway Co. v. Humes, 115 U. S., 512.

this mode is open to no constitutional objection, simply because, the value of the road as a whole was established as an instrument of inter-state commerce.*

But, whatever may be the extent or the operation of the general power of taxation, upon the part of the several States, or the limitations placed upon the exercise of this power, by the Constitution of the United States, it is nevertheless true, that when the taxing power, depends upon, and is necessary to the proper enforcement of the police power, it is as full and complete as that of Congress to regulate commerce.

Therefore, whenever the States' power of taxation is exercised in the enforcement of the police power, and when its purpose is to determine the quality and value of merchandise produced, manufactured and sold, within their respective jurisdictions, or, when its object is to preserve the character and reputation of the State, in foreign markets, or to prevent fraud on the public, in commercial transactions,† or to establish quarantine and health regulations to protect its inhabitants from disease, pauperism and crime, it may be exerted to any extent, without constitutional objection, even though the tax levied for this purpose, affect inter-state and foreign commerce;‡ and, it is as applicable to articles of trade,

*Pittsburg, Cincinnati, Chicago & St. Louis Railroad Co. v. Backus, 154 U. S., 421.

†See Patapsco Guano Co. v. Board of Agriculture, 171 U. S., 345 (355-7); St. Louis Consolidated Coal Co. v. Illinois, 185 U. S., 203; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S., 160.

‡Gilman v. Philadelphia, 3 Wall., 713; *Ex parte McNiel,* 13 id., 336.

which are intended for immediate traffic and consumption of its own people, as it is to those which are designed for import or export.*

The power of the several States to establish police regulations of this character, therefore, extends to the imposition of an inspection or license tax upon all articles of commerce, and upon all dealers in such articles, which may be legitimately brought within the scope of its operation.† It embraces such quarantine laws, as may be deemed necessary to enforce the exclusion of persons and property, actually infected by contamination and disease, as well as such as may have been indirectly exposed to infection;† and, the purpose of these laws, being to insure the State and its inhabitants from contamination and disease, each State possesses the inherent power to enact any regulations on the subject, which has this end in view.§

However, where a state inspection law applies to "imports and exports," the Constitution itself prescribes the limitation, and the tax laid, cannot exceed the cost of its enforcement; for it is expressly provided in that instru-

*Gibbons v. Ogden, 9 Wheat., 1 (203); Brown v. Maryland, 12 id., 419; Foster v. Portwardens, 94 U. S., 246.

†Schollenberger v. Pennsylvania, 171 U. S., 1; Patapsco Guano Co. v. Board of Agriculture, id., 345; Lindsley & Phelps Co. v. Mullen, 176 U. S., 126; St. Louis Consolidated Coal Co. v. Illinois, 185 U. S., 203; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S., 160; see also Plumley v. Massachusetts, 155 U. S., 461; Wooruff v. Parham, 8 Wall., 123; Hinson v. Lott, id., 148.

‡Smith v. St. Louis & Southeastern Railroad Co., 180 U. S., 248.

§Rasmussen v. Idaho, 181 U. S., 198.

ment, that any sum collected, in excess of this amount, shall be "for the use of the Treasury of the United States," and, that the law itself "shall be subject to the revision and control of Congress;"* and, it has been held, as a general proposition, applicable alike to persons and to merchandise, that the State, into which they come or are transported, may not under the guise of an inspection law, make any discrimination against persons, nor against the products and industries of any other State, in favor of its own citizens, or its own products or industries,† nor may it impose a license fee, for the purpose of inspection, upon a corporation, doing an inter-state business, which is so far in excess of the expense of inspection, that it is plain, that it was adopted, not to repay such expense, but as a means of raising a revenue.‡

The power of regulation, respecting any subject, is a power of government, which is continuing in its nature;§ and, as such, it may be exercised, whenever, and in whatever manner it may suit the will or convenience of the State, in which it is vested, and this statement necessarily applies to the legislative action of the several States, as well as to that of the federal government, whenever the subject-matter of the power falls within the constitutional

*Constitution U. S., Art. I., sec. X., cl. 2; Gibbons v. Ogden, 9 Wheat., 1 (203); Brown v. Maryland, 12 id., 419; Foster v. Portwardens, 94 U. S., 246.

†Brimmer vs. Rebman, 138 U. S., 78; see also Guy v. Baltimore, 100 U. S., 434.

‡Postal Telegraph Co. v. Taylor, 192 U. S., 64; see also Postal Telegraph Co. v. New Hope, id., 55.

§Stone v. Farmers' Loan & Trust Co., 116 U. S., 307.

authority of either, and, in its application to the commercial power, it, of course, implies the power to prescribe rules by which the various operations of commerce shall be governed.*

And, in so far as the power of the several States to regulate commerce is concerned, it has been said, that "the government, created by the Constitution, was not designed for the regulation of matters purely local in their character,"† and for this reason, it has always been held, that this power may be exercised, by the States, whenever it is intended for the local convenience of commercial transactions, or of those who may be engaged in commercial pursuits;‡ or, where the power is exercised, for the inspection of articles of trade, or for the enforcement of their inherent police power. The States may, therefore, enact laws interdicting vessels, coming from foreign ports, or from ports of the United States, from landing passengers and goods, when the interdiction is based upon a legitimate exercise of the police power; and in the exercise of this power the States may prescribe the time for vessels to quarantine, and impose penalties for a violation of such regulations as they may adopt, for this purpose, and this power necessarily includes the right to exact such fees, from owners or consignees of vessels, affected by its operation, as may be required to reimburse the State for the cost of detention, and the

*Addyston Pipe & Steel Co. v. United States, 175 U. S., 211 (242).

†Powell v. Pennsylvania, 127 U. S., 687, *per* Field J.

‡Pittsburg & Southern Coal Co. v. Bates, 156 U. S., 577.

fumigation of the vessels, cargo and persons on board.*

This power also extends to the regulation of vessels, while in port, and, in its exercise, the State may prescribe rules for their anchorage and mooring, designed to prevent confusion and collision; and, for this purpose, the law of the State may designate the wharfs, at which vessels may discharge and receive passengers and goods, and require their removals, when not thus engaged, so as to make room for other vessels; and, in the execution of such rules, the State may appoint officers to superintend and enforce its regulations, and may impose a tax, for that purpose, since this is only a means of reimbursing the State for the use of commercial facilities, provided by it, or by its authority.†

There has never been any question of the existence of this power, on the part of the several States, and, it has been uniformally recognized, by the legislative and judicial departments of the United States, since the adoption of the Constitution. Thus, concerning state quarantine regulations, the Acts of Congress of 1796 and 1799‡ expressly empowered and directed the officers, named in these Acts, to conform their action to, and assist in the execution of the quarantine and health laws of the several States; while the Act of 1878,§ expressly provided that "there shall be no interference," in its execution, "in

*Passenger Cases, 7 How., 283 (400).

†See Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.

‡2 U. S. Stat., 37; 3 id., 477.

§20 U. S. Stat., 37; see also, Morgan Steamship Co. v. Board of Health, 118 U. S., 455; Louisiana v. Texas, 176 U. S., 1; Campagnie Française de Navigation á Vapeur, 186 U. S., 380.

any manner with the quarantine regulations, as they may now exist, or may hereafter be adopted, under state laws."

It is also, under the exercise of the police power, that the several States are enabled to legislate, in all those matters, the purpose and object of which is to prevent the spread of crime, and to exclude, from their respective limits, convicts, persons likely to become a public charge, and persons afflicted with loathsome and contagious diseases.*

For this reason, it was early contended, that, in the exercise of their inherent police power, the States possessed the right to regulate the subject of foreign immigration, even though such regulation might affect the commercial and political relations between the United States and foreign nations, and notwithstanding the general rule laid down, by the Supreme Court of the United States, in the *Passenger Cases*,† the force of this contention, seems to have been fully recognized, and acted upon, by all the departments of the federal government,‡ for many years, under the maxim, that every nation has the power, inherent in its sovereignty, and essential

*Plunley v. Massachusetts, 155 U. S., 461 (478).

†7 How., 283.

‡The Act of Congress of June 15, 1878 (20 U. S. Stat., 177), shows how this matter was regarded, before that date, since it expressly provided, that "The acts of every State and municipal officer or corporation of the several States, in the collection of head-money, prior to January 1, 1878, from the master, consignee or owner of any vessels bringing passengers to the United States, from a foreign port, pursuant to the then existing laws of the several States, shall be valid, and no action shall be maintained against any such State or municipal officer, or corporation, for the recovery of any money so paid, or collected prior to that date."

to its self-preservation, to deny an entrance, into its dominion, of all immigrants, whom it might determine to be detrimental to its political welfare, or disadvantageous to its social interests; but since the effect of the determination of the court, in those cases, was, that the States may not prohibit the introduction of foreigners, into the United States, contrary to treaty stipulations between the United States and the country whence they came, or are brought into this country under the authority of Congress, the rule has since been established, that this power is vested exclusively "in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war," and, that, therefore, all authority to regulate immigration into the United States, belongs to the political department of that government, and may be exercised, by it, either through treaties, made by the President, by and with the advice and consent of the Senate, or through statutes enacted by Congress,* except, in so far as the judicial department may be authorized, by treaty or statute, or by the Constitution, to intervene.†

And, since the passage of the Act of Congress of 1878, the whole matter of the regulation of foreign immigration has been subject to federal control, and its power, in this respect, has been continually exerted, by the enact-

*Chae Chan Ping v. United States, 130 U. S., 581; Nishimura Eiku v. United States, 142 U. S., 651 (659); Fong Yue Ting v. United States, 149 U. S., 698 (705); United States, *ex rel.*, Turner v. Williams, 194 U. S., 279.

†Fok Yung Yo v. United States, 185 U. S., 296; Lee Gon Yong v. United States, id., 306.

ment of such laws, as those relating to the Chinese Cooley Trade; to the prohibition against the emigration of oriental subjects for purposes of prostitution; to the prevention of pauper immigration from Europe, and in other legislation of a similar character; and, Congress having thus assumed entire control over the subject, the States are bereft of all authority, in the matter, except, perhaps, when its exercise is necessary to the establishment and enforcement of their legitimate inspection, quarantine and health laws.

While the States may not enact any law, which, in effect, amounts to a regulation of foreign and inter-state commerce, it is nevertheless true, that when the regulation, in question, operates only upon that part of such commerce, which is carried on wholly within the State, it is open to no constitutional objection;* hence, it has been held, that the exaction of a tax license fee, by a State, upon a foreign corporation, as a condition to its right to have an office, for the transaction of business in the State, is within its legislative authority,† and will be upheld, and the right of the several States to fix and regulate the amount of tolls, for the use of wharfs, piers, elevators and improved channels of navigation, has so frequently been recognized, that its existence can no longer be doubted.‡

The grounds upon which the power of the States to

*State of New York, *ex rel.*, Pennsylvania Railroad Co., v. Knight, 192 U. S., 21.

†Pembina Mining Co. v. Pennsylvania, 125 U. S., 184.

‡Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S., 204.

regulate the tolls to be charged, by the owners of such instruments of commerce, as has been already stated, is the public use in which they are employed,* as well as the right of the State to exact the payment of compensation for the use of such instruments, and for their construction, maintenance and operation, and since they may furnish these facilities, or permit them to be furnished by individuals or corporations,† the States may determine the amount of the charge, which shall be made for their use,‡ without violating the Constitution of the United States,§ or trenching upon the commercial power of Congress, and, therefore, it has been held, that the exaction of such compensation, or the determination of the amount which shall be paid, is in no sense a regulation of commerce, within the meaning of that instrument.¶

And, while it has been held, that the States may exact a license fee for the use of improvements on navigable rivers, the authorities are also uniform, upon the proposition, that such tax can never be laid, for the use of the navigable waters of such rivers, employed for the purposes of inter-state and foreign commerce;‖ nor, where the improvement is a bridge, connecting two States;**

*Munn v. Illinois, 94 U. S., 113.

†Wisconsin, Minnesota & Pacific Railroad Co. v. Jacobson, 179 U. S., 287.

‡Lindsley & Phelps Co. v. Mullen, 176 U. S., 126.

§Sands v. Manistee River Improvement Co., 123 U. S., 288; Monongahela Navigation Co. v. United States, 148 U. S., 312 (339, 330).

¶Harman v. Chicago, 147 U. S., 396 (411).

**Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S., 204 (221); see also, Covington & Cincinnati Elevated Railroad Transfer & Bridge Co., v. Kentucky, id., 224.

and, as has already been seen, a State cannot, under the guise of a license tax, exclude, from its territorial limits, a foreign corporation, engaged in such commerce,* for the reason, as has been held, that the right to engage in that commerce, is not derived from the States, in which it is carried on, but is a privilege guaranteed to it, by the Constitution of the United States, and this privilege cannot be abridged by any action on the part of any one of the several States. And, while it has been held, that although a State may so far regulate the movement of trains, owned by a corporation, engaged in the business of inter-state commerce, as to require them to stop at certain stations on its line of road, if the direct effect of such regulation be to hinder and obstruct inter-state commerce, or otherwise interfere with its movement, or with the usefulness of the facilities, furnished by the corporation, it will be condemned;† and a municipal corporation cannot impose a license fee, on a telegraph company, engaged in the business of transmitting inter-state messages, even for the purpose of inspection, which is so far in excess of the expense of inspection, as to show, that it was adopted, not to repay such expense, but as a means of raising a revenue for general municipal purposes.‡ Upon the other hand, in considering the subject of the liquor traffic between the States, it has been held, that the power of the States to regulate

*Crutcher v. Kentucky, 141 U. S., 47 (51), citing Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S., 114.

†Illinois Central Railroad Co. v. Illinois, 163 U. S., 142 (153).

‡Postal Telegraph Co. v. New Hope, 192 U. S., 55; Same v. Taylor, id., 64.

the sale and use of intoxicating liquors is such, that the traffic may be absolutely prohibited, or it may be regulated, under a local option law, enacted by the Legislature of a State.*

In those cases, where the State's power of regulation is based upon its general legislative authority concerning its own political and civil institutions, or where the value of the subject of the regulation depends upon a franchise derived from the State, it has been contended, that since the grant of such franchise implies a contract between the State and the individual or individuals to whom it is granted, the power of the State to regulate its use is to be determined by the terms of the grant, and, that if the grant may be so construed as to exclude this power, it will be protected from the assertion of any authority, which may be claimed, on the part of the State, by that clause of the Constitution of the United States, which provides, that no State may pass any law impairing the obligation of contracts;† but, in regard to this contention, it has been held, that, while the Legislature of a State may, perhaps, for a consideration, limit its power of regulation, as is sometimes the case in respect of taxation, still, if the power may be bargained away at all, it can be done only by words of positive grant, or something, which, in contemplation of law, amounts to the same thing;‡ and, if, therefore, there be a reasonable doubt, concerning the grant, it will always be resolved

*Ohio, *ex rel*,. Lloyd v. Dollison, 194 U. S., 445.
†U. S. Const., Act. I., Sec. X., cl. 1.
‡Stone v. Farmers' Loan & Trust Co., 116 U. S., 307.

in favor of the continued existence of the power, and its abandonment will never be presumed, in a case, where the deliberate purpose of the State to abondon, does not clearly appear.*

Whatever may be the extent of the operation of the power of the several States, concerning the regulation of commerce, growing out of a proper and legitimate exercise of their police and taxing power, or arising from their inherent power to legislate concerning their political and civil institutions, it is, however, well settled, that whenever the power of Congress attaches to any commercial subject, its authority over that subject is complete, and is affected by no limitation, other than such as may have been prescribed by the federal Constitution; and, therefore, in the accomplishment of the purposes, for which this power was vested in the federal government, Congress may adopt such means as it may deem requisite and appropriate to that end.† Hence, its power to regulate commerce may be exerted by means of tariff legislation, the purpose and effect of which is to exclude certain articles of trade, from the limits of the United States altogether;‡ or the power

*Providence Bank v. Billings, 4 Pet., 514; Charles River Bridge v. Warren Bridge, 11 id., 420; Minot v. Philadelphia, Wilmington & Baltimore Railroad Co., 18 Wall., 206; Bailey v. Magwire, 22 id., 215; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S., 660; Newton v. Commissions, *etc.*, 100 U. S., 548.

†Inter-state Commerce Commission v. Brimson, 154 U. S., 447 (478); Northern Securities Co. v. United States, 193 U. S., 197 (335); see also, *In re* Rahrer, 140 U. S., 345; Lottery Cases, 188 U. S., 321 (355).

‡9 U. S. Stat., 237; 29 id., 604; Butterfield v. Stranahan, 192 U. S., 470; Same v. Bidwell, id., 498; Same v. United States, id., 499.

may be exercised by the granting of licenses to individuals or corporations engaged in commerce with foreign nations, among the States or with the Indian tribes. And, when a license for this purpose is granted by the government of the United States, it necessarily confers, upon the licensee, full authority to do whatever is authorized to be done, by its terms.* In the exercise of its regulating power, Congress may also prohibit unjust charges, discrimination and preference, by common carriers, upon inter-state transportation, and it may create a Commission to carry its legislation to this end, into effect;† and, owing to the plenary power of Congress over the subject of foreign commerce, it follows, that no individual has a vested right to trade with foreign nations, which is so broad in its character, as to limit its power to determine what articles of merchandise may be imported into the country, or the terms upon which a right to import them may be exercised.‡

However, since the power to regulate commerce, vested in Congress, by the Constitution, is a power wholly independent of the taxing power, and the one having no relation to the other, except in so far as both may be considered integral parts of that general plan of government, outlined and established by that instrument, it follows, that the taxing of imports by the federal government is not to be sustained under the grant of the com-

*License Tax Cases, 5 Wall., 462.

†Inter-state Commerce Commission v. Brimson, 154 U. S., 477 (472).

‡Butterfield v. Stranahan, 192 U. S., 470 (493).

mercial power to Congress, but under the taxing power alone. The imposition of duties, it is true, may operate as a regulation of commerce, but, this is merely incidental, its main object being to raise a revenue, and, for this reason, it has been said, that the power to levy a tax, upon imports, was granted to the federal government, and prohibited to the States, by the very terms of the Constitution itself.*

In considering the effect of coasting licenses, granted, by the United States, to the owners of vessels, engaged in the business of commerce among the States, and the right it confers, upon the holder, *Mr. Justice Clifford,* delivering a dissenting opinion, in the case of *Gilman* against the *City of Philadelphia,*† referred to the discussion of the question, in the case of *Gibbons* against *Ogden,* and said:—License as the word is used, in the Act of Congress, means, say the court, permission or authority and the court held, that a license to do a particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, it transfers to the grantees the right to do whatever it purports to authorize. Adopting the language of the court, in that case, it certainly transfers to him, all the right, which the grantor can transfer, to do what is within the terms of the license. Ships and vessels enrolled, and licensed, under the Act of Congress, and no others are deemed ships and vessels

*Brown v. Maryland, 12 Wheat., 419. See Gibbons v. Ogden, 9 Wheat., 1 (201 *et seq.*); Passenger Cases, 7 How., 283 (449).

†3 Wall., 713.

of the United States entitled to the privileges of ships or vessels employed in the coasting trade. Majority of the court, as stated, in the opinion just read, admits that a ship or vessel of the United States, which is duly enrolled and armed with a coasting license, such as is required by the Enrollment Acts, may navigate the coast of the United States, and may pass from the open sea into the public navigable rivers of the United States, and up the same, as far as the navigable waters extend. Coming more directly to the case, under consideration, the opinion admits, that such a ship or vessel has a right, under such an enrollment, or with such a coasting license, to navigate from the sea, up the river described in the record, to the wharfs of the complainant."

Whatever may have been the conclusion drawn, by the learned justice from this statement, in its application to the facts of the case, then under consideration, the statement itself clearly expounds the legal scope and effect of a coasting license granted by the federal government, which has always been held to be a warrant to the holder to traverse the waters washing or bounding the United States, to enter these waters and to enjoy all the privileges which are incident to their navigation. However, it is a principle equally well established, that the authority of such a license can never be extended, so as to control privileges or rights, beyond its legitimate import, nor invade the constitutional rights of the several States, whether these rights be attributable to the police power, or to any other the rights of the States, which have not been surrendered or delegated to the

federal government by the terms of the Constitution; nor can such license, under any circumstances, convey to the licensee, and privilege to use free of toll, canals constructed by the States, or water-courses partaking of the character of canals, situated exclusively within the interior of any State, and made practicable, for navigation, by the funds of the State, by which they are constructed or improved, or under privileges, which the States may have conferred, for the accomplishment of the same end; and any attempt to use a coasting license, for a purpose of this kind, has been declared to be not only a departure from the obvious meaning of the Constitution, but also beyond the object and the scope of the power granting it;* and, the enrollment and licensing of vessels, under an Act of Congress, gives the licensee no right to violate a legitimate statute of a State.†

When, therefore, the master of a ship attaches his vessel to a pier, without authority from the owner of the pier, either express or implied, and he has no business to transact with such owner, he is a trespasser, and all pretense of a license fails.‡

In the exercise of its constitutional power to levy taxes, for the support of the government, Congress has also, by legislation, provided for the granting of licenses, to dealers in liquors, to pursue their calling, within certain revenue districts of the United States; and, the extent of the operation of such licenses have likewise been

*Veazie v. Moor, 14 How., 568.
†Manchester v. Massachusetts, 139 U. S., 240 (261).
‡Sutton v. Strong, 1 Black, 1.

the subject of litigation in the courts, the licensee contending, that any infringement upon the privilege, thus granted, by the laws of a State, was in violation of the constitutional power of Congress to regulate commerce, and was therefore void, as against a license authorized by, and issued under an Act of Congress. But, the sufficiency of this contention has always been denied, and, on several occasions, the Supreme Court of the United States has determined, that the sale of such merchandise, within a State, is subject exclusively to state control,* for the reason, that a license, issued under an Act of Congress, gives to the licensee no right to keep or sell intoxicating liquors, in violation of a state law, and, therefore, it is no defense to an indictment, under the laws of the State.† Hence, a state law requiring a license, before an individual shall be permitted to sell intoxicating liquors, at retail, is not unconstitutional, at least, where it does not interfere with the sale of imported liquors, in original packages.‡ But, in the case of *Pervear* against the *Commonwealth of Massachusetts*, which was a license tax case,§ the question as to the effect of a license granted to dealers in liquors, under the revenue laws of the United States was distinctly raised, and in disposing of this question, *Mr. Chief Justice Chase,* who delivered the opinion of the court, held, that, "The circumstance, that the state prohibition

*License Cases, 5 How., 504; License Tax Cases, 5 Wall., 462.
†McGuire v. Commonwealth of Massachusetts, 3 Wall., 387.
‡See also, License Cases, 5 How., 504.
§5 Wall., 462.

applies to merchandise in the original package is wholly immaterial. Even in the case of importation," says he, "that circumstance is only available to the importer. Merchandise in the original package, once sold by the importer, is taxable as other property. But, in the case before us, there is no importation. So far as it appears, the liquors [in question] were home-made, or, if not, were in second hands;" and, therefore, the court determined, that the law, the constitutionality of which was attacked, in that case, fell within the legitimate scope of the operation of the taxing power of the State, and for that reason it was upheld.

This ruling was in strict conformity with principles laid down, by the Supreme Court of the United States, in the *License Cases*, as early as 1847, which were steadily adhered to and followed, until, 1889, when they were reversed, by the decision of that court, in the case of *Leisy* against *Hardin*,* which held, that, inasmuch as such liquors constituted a lawful subject of trade, their sale, in any State, could not be regulated by its legislation, when they were the subject-matter of inter-state commerce.

But, the effect of this decision made such an innovation, in the doctrines, theretofore entertained, respecting the application of the police power of the States, in its operation upon the liquor traffic, that Congress immediatel enacted a statute,† which provided, among other things, that fermented, distilled or intoxicating liquors,

*135 U. S., 100.
†Act of Congress of August 8, 1890.

transported into any State or Territory, should, upon arrival, be subject to the operation of the laws of such State or Territory, to the same extent and in the same manner as though such liquors had been produced, in that State or Territory, and should not be exempt therefrom by reason of having been introduced therein, in original packages.

This statute was afterwards presented to the court for construction and interpretation in the case of *Scott* against *Donald,** and, while *Mr. Justice Brown,* expressed the opinion, in a dissenting opinion delivered, by him, in that case, that "the effect of this enactment" was "to withdraw intoxicating liquors from the operation of the commercial clause of the Constitution, and *permit* the traffic in them to be regulated in such manner as the several States, in the exercise of their police power, shall deem best for the general interest of the public," a majority of the court held, that it did not preclude the federal courts from inquiring into the question as to whether a given state law is a lawful exercise of the police power of the State, and, that, even under the Act, the State cannot discriminate between inter-state and domestic commerce, in commodities, the manufacture and use of which are admitted to be lawful.

Whatever may be the effect of this decision, upon this legislation of Congress, the dissenting opinion of *Mr. Justice Brown,* above referred to, presents the question as to whether, that legislation, be a recognition of the right of the several States to regulate the sale of liquors,

*165 U. S., 58 (102.)

within their respective limits, under the exercise of their inherent police power, or whether it be an act of permission only. The first of these questions has never been determined; but, *In re Rahrer,** the second question was considered, and partially answered, in the opinion of *Mr. Chief Justice Fuller,* when he said, that, in the passage of the Act of Congress of August 8th, 1890, providing that imported liquors should be subject to the operation of the state laws, to the same extent as though they had been produced in the State, Congress did not use terms of permission to the States, but simply removed an impediment to the enforcement of the state laws, in respect of imported packages, in their original condition, created by the absence of a specific utterance on its part; and, that jurisdiction attaches, not in virtue of the law of Congress, but, because, the effect of that law was to place the property where jurisdiction could attach. And, this opinion of the learned Chief Justice is clearly in line with former decisions of the court, and its ultimate adoption, as a constitutional rule, is the only safeguard against an invasion of the well recognized police power of the several States. Any other result would involve a denial, to the States, of a power, which they have never surrendered to the federal government, and would give rise to the implication, that the States may receive, from Congress powers, which it does not possess, a doctrine, as repugnant to the whole federal theory, as it is to the independent existence of the States itself.

The States having, therefore, the constitutional power

*140 U. S., 545 (564-5).

to impose a license fee, upon sellers of intoxicating liquors and other noxious articles of commerce, within their respective jurisdictions, they may do so either directly or through the instrumentality of one of its municipal corporations; and a special license tax, imposed by such a corporation, so authorized by the State, for the privilege of selling beer, is not obnoxious to the commercial clause of the Constitution of the United States.*

In like manner, a State may impose a license tax, either directly, or through a municipal corporation, upon the keepers at a ferry, for boats owned by them, and used in the transportation of passengers and goods, from a landing in the State, imposing the tax, across a navigable stream, to a landing in another State.†

A state law, however, requiring a license tax to be paid by the owners of commercial articles; or upon the instrumentalities of foreign and inter-state commerce, must be uniform in its operation, and, if the law discriminate against goods, or passengers, from outside the State, it will be declared unconstitutional,‡ and, even without such declaration, it can have no valid operation.

But, it has been said, that a license to sell liquors, under the revenue laws of the United States, providing for the establishment of collection districts, embracing the Territories, where the Indians reside, does not have the effect of conferring an absolute right, upon the li-

*Downham v. City of Alexandria, 10 Wall., 173.
†Wiggins Ferry Co. v. East St. Louis, 107 U. S., 365.
‡Welton v. Missouri, 91 U. S., 275.

censee, to sell liquors, for the reason, that such a license does not authorize the introduction of liquors into the Indian country, contrary to the laws established by Congress, for the government of these Territories.*

A license granted by the United States, being, like any other license, a personal privilege, is revocable, at the pleasure of the government; it ceases with the death of the licensee, and cannot be transferred, or alienated.† Therefore, when a law of Congress authorizes the grant of a license to erect and maintain a bridge across a navigable stream, the owner of the bridge, in accepting its provisions, takes it, subject to the reservation, implied in the grant, that Congress may, withdraw the license, or direct necessary alterations to be made, in the structure; and, such a license may be withdrawn, at any time, within the discretion of Congress; and, therefore, it is not necessary to first judicially ascertain whether the bridge, either does, in fact, or would, if constructed, under the license, materially obstructs the navigation of the stream, over which it is built; and, if in the judgment of Congress, the public interest require the bridge to be removed, or alterations to be made in the manner of its construction, the United States is not liable to make compensation to the owners, for loss occasioned, by what was directed to be done, although the bridge, so far as it may have progressed, was constructed in substantial compliance with the provisions of the law, relating to its construction.‡

*United States v. 43 Gallons of Whiskey, 108 U. S., 491.
†De Haro v. United States, 5 Wall., 599.
‡Newport & Cincinnati Bridge Co. v. United States, 105 U. S., 470.

Whenever it may be determined, that the federal power of regulation attaches to any of the subject of commerce, it necessarily follows, that the power, by virtue of its own operation, carries with it full authority to enforce such regulation as Congress may deem proper to adopt; and, in the exercise of this authority, it may provide for the enforcement of its mandates and for the prevention of any act which may interfere with, or obstruct the due execution of that authority;* and, this may be accomplished through the means of a civil or criminal proceeding against the offender. However, in reference to the Act of Congress establishing the Interstate Commerce Commission, in the case of the *Interstate Commerce Commission* against *Brimson,* it was contended, that Congress had no power to provide any method, by which that commission could enforce the provisions of the statute, or compel obedience to its lawful orders, except through criminal proceedings or by civil actions to recover the penalties imposed, for non-compliance with its orders; but, in disposing of this contention, the court held, that, "any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal object for which the Constitution was ordained."† and, so ruled, in reference to the facts, presented in that case, and under which its determination was had.

Hence, the power to prescribe rules for the regulation

In re Debs, 158 U. S., 564 (581).
†154 U. S., 447.

of commerce, includes the right, not only to determine what such rules shall be, but also, to declare the liability which shall follow their infraction, and to the extent of the power, vested by the Constitution, in the federal government, whatever Congress may determine, either as a regulation of the subject, upon which it was designed to operate, or as a liability for its infraction, is exclusive of state authority;* and, an Act of Congress, constitutionally enacted, under its power to regulate commerce among the States and with foreign nations, is binding upon all, and its provisions are as obligatory, as if they were, in terms, embodied in the Constitution itself.†

As has already been suggested, the federal power of regulation "consists as much in negative as in positive action."‡ Whence, it follows, that the power to regulate that commerce, which is vested in the federal government, may be exercised, without legislation, as well as with it; and, by refraining from taking any action on the subject, Congress adopts, as its own regulations, those rules, which the common, or the civil law, (where the principles of the civil law prevail), has provided for the government of commercial business, and those which the several States, may have adopted, in the regulation of their domestic concerns,—but not regulating it within the meaning of the Constitution. In fact, it has been held, that congressional action is

*Sherlock v. Alling, 93 U. S., 99.

†Northern Securities Co. v. United States, 193 U. S., 197 (333).

‡Passenger Cases, 7 How., 283 (399).

only necessary, to cure defects, or to supply omissions in existing laws, as they may be discovered, and to adopt such laws to new developments of trade.† Therefore, in the absence of any action, on the part of the federal government, it is said, Congress exerts its power to regulate commerce and intercourse, with foreign nations and among the States, by willing that it shall be free.

The mere fact, however, that Congress has not seen fit to prescribe a specific rule, in the exercise of its commercial power, it is said, does not affect, in any wise, the power itself; and, whenever the power is exclusive in the federal government, on account of the natonal character of the subject-matter of its regulation, and, for this reason, admits of but one uniform system or plan of regulation, it has been declared to be so far exclusive in Congress, that no State has the power to make any regulation, which will, in any way, effect the free and unrestricted intercourse with foreign nations, and among the States, as Congress has left it, or which will impose any discriminating burden upon the products of other States, whether they be of the federal Union or of foreign nations, coming to, or brought within their several jurisdictions.*

So, when the subject-matter of the power falls within the exclusive authority of Congress, that body may alone act in the premises, and, its non-use of the power

†Hall v. De Cuir, 95 U. S., 485.

*See Welton v. Missouri, 91 U. S., 275; Brown v. Houston, 114 U. S., 622; County of Mobile v. Kimball, 102 U. S., 691; Weber, v. Virginia, 103 U. S., 344.

is said to amount a declaration that, it shall be free from all burdens, which might be imposed, by state legislation;* therefore, it can never be successfully urged, that the federal governement has lost its power, by reason of its non-user, because, a power of government, which actually exists is never lost; for, as was said, in the case of the *Chicago, Burlington & Quincy Railroad Company* against the *State of Iowa,*† "A good government never puts forth its extraordinary power, except under circumstances, which require it," for says the court, "that government is the best, which, while performing all its duties, interferes the least, with the lawful pursuits of its people."

*Gloucester Ferry Co. v. Pennsylv-nia, 114 U. S., 196.
†94 U. S., 155 (162).

THE END.